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No. 2299

United States
Circuit Court of Appeals

For the Ninth Circuit.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and
KATALLA COMPANY, a Corporation,
Plaintiffs in Error,

vs.

DANIEL S. REEDER,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska,
Third Division.

FILED

AUG 29 1913

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Court of appeals

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Circuit Court of Appeals

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COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation, and
KATALLA COMPANY, a Corporation,
Plaintiffs in Error,
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Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska,
Third Division.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court for the Territory of Alaska,
Third Division.*

C.—42.

DANIEL S. REEDER,

Plaintiff and Appellee,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corp., and THE
KATALLA COMPANY, a Corp.,
Defendants and Appellants.

Names and Addresses of Attorneys of Record.

J. H. COBB, Juneau, Alaska, Attorney for Plaintiff
and Appellee.

R. J. BORYER, Cordova, Alaska, Attorney for De-
fendants and Appellants.

JNO. R. WINN, Juneau, Alaska, Attorney for De-
fendants and Appellants. [1*]

In the District Court for Alaska, Third Division.

C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY AND COPPER RIVER
& NORTHWESTERN RAILWAY COM-
PANY,

Defendants.

*Page-number appearing at foot of page of original certified Record.

Complaint.

The above-named plaintiff, complaining of the above-named defendants, for cause of action alleges:

I.

The defendants are corporations duly incorporated and doing business as common carriers in the District of Alaska, and were engaged in such business at all the times hereinafter mentioned.

II.

That heretofore, to wit, on the 7th day of August, 1911, and for some time prior thereto, plaintiff was in the employ of the defendants as a carpenter upon the line of railway running from the town of Cordova up the Copper River into the interior of Alaska, and on said day was at work by the direction of the defendants at or near Mile 131 on said line of railway, in a certain tunnel thereon.

III.

That on said 7th day of August, 1911, while plaintiff was at work as aforesaid, the timbers supporting the roof of said tunnel broke and gave way, and the plaintiff was caught underneath the said falling timbers, earth and gravel, and sustained serious and permanent injuries to his person in this: that his left leg was bruised and crushed for its entire length and so maimed and injured as to be permanently disabled; [1a] that the bones and skeleton supporting the lower abdomen were broken and crushed; that by reason of said injuries, plaintiff was confined to the hospital for a period of about four months, during which time he suffered, and has ever since continued

and is still suffering the most intense physical pain; and has been incapacitated from earning a living, although the defendants continued the plaintiff upon their payrolls at the rate of five dollars (\$5.00) per day for the said period of four months, when they discharged him from the hospital and from said payrolls.

IV.

That the accident by which plaintiff was injured as aforesaid was caused by the negligent failure of the defendants to furnish the plaintiff with a reasonably safe place to work; that said place was unsafe and dangerous by reason of the negligent failure of the defendants to suitably timber and protect the workmen employed in said tunnel from the danger of cave-ins and falling of material constituting the roof of the bore of said tunnel. All of which was known to the defendants, or by the use of reasonable diligence could have been known by them, but was unknown to the plaintiff.

V.

That the plaintiff at the time of the injuries aforesaid was earning, and but for said injuries could have continued to earn, the sum of five and one-half (\$5.50) dollars per day; that by reason of said injuries he has suffered great agony, both of body and mind, been deprived of his source of living, and is incapacitated to earn a living and damaged in the total sum of twenty-five thousand (\$25,000.00) dollars.

WHEREFORE, the plaintiff prays damages in the said sum of twenty-five thousand (\$25,000.00)

dollars, together with the costs and disbursements herein incurred.

J. H. COBB,
Attorney for Plaintiff. [2]

United States of America,
District of Alaska,—ss.

Daniel S. Reeder, being first duly sworn, on oath deposes and says: I am the plaintiff above named. I have read the above and foregoing complaint, know the contents thereof, and the same is true as I verily believe.

DANIEL S. REEDER.

Subscribed and sworn to before me this, the 25th day of March, 1912.

J. H. COBB,
Notary Public in and for Alaska.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Mar. 26, 1912. Ed. M. Lakin, Clerk. By Thos. S. Scott, Deputy. [3]

[Summons.]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY AND COPPER RIVER
& NORTHWESTERN RY. CO.,
Defendants.

The President of the United States of America,
Greeting: To the Above-named Defendants:

YOU ARE HEREBY REQUIRED to appear in the District Court for the Territory of Alaska, Third Division, within thirty days after the day of service of this summons upon you, and answer the complaint of the above-named plaintiff, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will take judgment against you for the sum of Twenty-five Thousand Dollars, the relief demanded in said complaint.

WITNESS, the Hon. E. E. CUSHMAN, Judge of said Court, this 26th day of March in the year of our Lord one thousand nine hundred and twelve and of our independence the one hundred and sixth.

[Seal]

ED. M. LAKIN,
Clerk.

By Thos. S. Scott,
Deputy Clerk.

Marshal's No. 363. [4]

United States of America,
Territory of Alaska,
Third Division,—ss.

I hereby certify and return that I received the annexed Summons on the 28th day of March, 1912, and thereafter on the 1st day of April, 1912, at Cordova, Alaska, I served the same upon the therein named Katalla Company, by delivering to and *leaving* George Geiger, service agent for said Katalla Company, a copy of said summons, together with a certified copy of the complaint filed therewith; and

thereafter on the same date I served the same upon the therein named Copper River & Northwestern Ry. Co., by delivering to and leaving with George Geiger, service agent for said Copper River & Northwestern Ry. Co., a copy of said summons, together with a certified copy of the complaint filed therewith.

Returned this 1st day of April, A. D. 1912.

H. P. SULLIVAN,

U. S. Marshal.

By S. T. Brightwell,

Deputy.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 4, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [5]

*In the District Court for the District of Alaska,
Third Division.*

C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

THE KATALLA COMPANY AND COPPER
RIVER & NORTHWESTERN RAILWAY
COMPANY,

Defendants.

**Motion to Make Complaint More Definite and
Certain.**

Comes now the defendant and moves the Court to require the plaintiff to make his complaint more

definite and certain in the following particulars:

I.

That the plaintiff be required to make paragraph II of complaint more definite and certain in that

A. Plaintiff be required to state if his contract of employment was in writing or if oral.

B. If in writing, to attach a copy or make said contract a part of the complaint or furnish the defendant a copy of same.

C. If said contract is not in writing, to set out in his complaint the contents of the plaintiff's contract of employment.

D. To state with what officer or what agent the plaintiff entered into said contract of employment, and to state if said contract of employment was with an officer or agent of the Katalla Company or the Copper River & Northwestern Railway Company.

E. That the plaintiff be required to state the nature of his employment or work; that is, the nature or kind of [6] work he was to perform and was performing under his contract of employment at the time of receiving his injury.

F. That plaintiff be required to state what officer or agent the plaintiff was under direction on the 7th day of August, 1911, when injured and what orders had been given or directed to plaintiff and by whom.

G. That plaintiff be required to state what agent or employee of the defendant or defendants or what person discharged plaintiff from the hospital.

II.

Referring to paragraph III of the complaint, that

said paragraph be made more definite and certain in that:

A. Plaintiff be required to state the nature and kind of work or employment the plaintiff was engaged in on the 7th day of August, 1911, as referred to in lines 1 and 2 of paragraph III.

B. That plaintiff be required to state what bones and what part of the skeleton supporting the lower abdomen were broken and crushed.

III.

Referring to paragraph IV, that said paragraph be made more definite and certain in that it state:

A. Plaintiff be required to state in what way or manner defendant or defendants failed or neglected to suitably timber and protect the workmen employed in the tunnel from danger of cave-in and falling of material constituting the roof of the bore of said tunnel.

R. J. BORYER,

Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 3, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [7]

United States of America,
District of Alaska,—ss.

I, G. Geiger, being first duly sworn, deposes and says: That I am the Superintendent of Katalla & Copper River Railway Companies, defendants named in the above-entitled action, and that the foregoing motion is true as I verily believe.

Subscribed and sworn to before me this the — day of ———, A. D. 1909.

_____,
Notary Public for the District of Alaska. [8]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY AND COPPER RIVER
& NORTHWESTERN RAILWAY COM-
PANY,

Defendants.

Bill of Particulars.

Now comes the plaintiff and files this, his Bill of Particulars, in accordance with the ruling of the Court, as follows:

1. The contract of employment was oral.
2. The contents of the contract was simply to do such work as he might be directed in his line of employment and providing for the compensation stated.
3. Plaintiff cannot give the name of the officer or agent by whom he was employed and does not know of his own knowledge whether he was an officer or agent of the Katalla Company or of the Copper River & Northwestern Railway Company, but he believes and alleges on such belief that it was an agent or officer of both.
4. On the 7th day of August, 1911, at the date

plaintiff received the injuries mentioned in the complaint, one Dan Lee was the immediate foreman and the work and directions given were to put in mud-sills in the tunnel.

5. On or about the date stated in the complaint plaintiff left the hospital after conversation with R. J. Broyer, attorney for the defendants, was visited by the hospital doctor some time thereafter but was not formerly discharged from the hospital on the said date otherwise.

6. Plaintiff does not know the names of the bones and that part of the skeleton supporting the lower abdomen which were broken and crushed, not being an anatomist, and the defendants' physicians and surgeons have refused to allow him to have an X-ray photograph of the said broken bones so that plaintiff might obtain from authoritative sources the information on this point called for in defendants' motion. [9]

7. The defendants failed and neglected to suitably timber the said tunnel so as to protect the workmen, by using old and weakened timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon.

DANIEL S. REEDER,
Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 28, 1912. Ed. M. Lakin, Clerk. [10]

**[Order Allowing Plaintiff to Amend Complaint by
Interlineation, etc.]**

*In the District Court for the Territory of Alaska,
Third Division.*

Special May, 1912, Term—May 25th—6th Court Day.

C.—42.

MINUTE ORDER.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY AND COPPER RIVER &
NORTHWESTERN RY. CO.,

Defendants.

Now, on this day, this matter coming on to be heard upon the motion of the defendant to make more definite and certain, R. J. Boryer, Esq., appearing for the defendant; J. H. Cobb, Esq., appearing for the plaintiff, and after arguments had and the Court being fully advised in the premises,—

IT IS ORDERED that the plaintiff be allowed to amend his complaint, as filed herein, by interlineation, and is ordered to file a Bill of Particulars, and the defendant is given ten days from the date of filing said Bill of Particulars in which to further plead.

Entered Court Journal No. C. 1, page No. 278.

*In the District Court for the Territory of Alaska,
Third Division.*

C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

THE KATALLA COMPANY and COPPER
RIVER & NORTHWESTERN RAILWAY
COMPANY,

Defendants.

Answer [of Copper River & N. W. Ry. Co.].

Comes now the Copper River & Northwestern Railway Company, answering separately the above-entitled complaint in said action, says:

I.

Admits that the Copper River & Northwestern Railway Company is and was at the time mentioned in the complaint a corporation doing business in the District of Alaska, and admits that the Copper River & Northwestern Railway Company was doing business as a common carrier in the District of Alaska at the time or times mentioned in the complaint.

II.

Answering paragraph 2 of the complaint, the Copper River & Northwestern Railway Company admits that the plaintiff was not on the 7th day of August, A. D. 1911, or at any time prior thereto, in the employ of the Copper River & Northwestern Railway Company as a carpenter or in any other

capacity, and denies that said plaintiff was working for the Copper River & Northwestern Railway Company in a tunnel or about a tunnel located at Mile 131 at any times mentioned in the complaint.

III.

Answering paragraph 3 of the complaint, the Copper River & Northwestern Railway Company denies each and all of the allegations contained therein. [12]

IV.

Defendant, The Copper River & Northwestern Railway Company, denies each and all of the allegations contained therein.

V.

Defendant, The Copper River & Northwestern Railway Company, answering paragraph 5 of the complaint, denies each and all of the allegations contained therein.

AFFIRMATIVE DEFENSE.

The Copper River & Northwestern Railway Company, defendant herein, for first, separate and affirmative defense, alleges:

I.

That if the plaintiff received an injury on the 7th day of August, A. D. 1911, said injury or injuries were caused by and arose out of and from risks incident to his employment and business in which said plaintiff engaged and which risks the plaintiff assumed.

Defendant, the Copper River & Northwestern Railway Company, for second, separate and affirmative defense, alleges:

I.

That if plaintiff was injured on about the 7th day of August, A. D. 1911, said injuries were caused by the negligence or contributory negligence of the plaintiff and of or by the negligence of a fellow-servant.

Wherefore, defendant, The Copper River & Northwestern Railway Company, requests that this case be dismissed with costs to plaintiff.

R. J. BORYER,
Attorney for Defendant, Copper River & Northwestern Ry. Co.

United States of America,
District of Alaska,—ss.

George Geiger, being first duly sworn, upon his oath [13] deposes and says: That he is Superintendent of the Copper River and Northwestern Railway Company and attorney in fact for the transaction of all business for the Katalla Company, at Cordova, Alaska; that he had read the answer in this action, knows the contents thereof and that the same are true.

GEORGE GEIGER.

Subscribed and sworn to before me this 7th day of June, A. D. 1912.

[Seal] R. J. BOYER,
Notary Public in and for the District of Alaska,
Residing at Cordova.

This is to certify that the above is a true and correct copy of the original answer in this case.

R. J. BORYER,
Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 8, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [14]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

THE KATALLA COMPANY and COPPER
RIVER & NORTHWESTERN RAILWAY
COMPANY,

Defendants.

Answer [of Katalla Co.].

Comes now Katalla Company and answering separately the above-entitled action, says:

I.

Admits that the Katalla Company is and was, at the time mentioned in the complaint, a corporation doing business in the District of Alaska, but denies that the Katalla Company was doing business as a common carrier in the District of Alaska, and denies that the Katalla Company was engaged as a common carrier at any of the time or all of the time mentioned in the complaint.

II.

Answering paragraph 2 of the complaint, the Katalla Company admits that the plaintiff was on the 7th day of August, A. D. 1911, and for some time prior thereto, in the employ of the Katalla Company

as a carpenter, and was on the 7th day of August, A. D. 1911, working as a carpenter at or near Mile 131 in a tunnel located at Mile 131.

III.

Answering paragraph 3 the Katalla Company denies each and all of the allegations contained therein.

IV.

Defendant, Katalla Company, answering paragraph 4 of the complaint, denies each and all of the allegations contained therein. [15]

V.

Defendant, Katalla Company, answering paragraph 5 of the complaint, denies each and all of the allegations contained therein.

AFFIRMATIVE DEFENSE.

The Katalla Company, defendant, herein for first separate and affirmative defense, alleges:

That if the plaintiff received an injury on the 7th day of August, A. D. 1911, said injury or injuries were caused by and arose out of and from risks incident to his employment and business in which said plaintiff was engaged and which risks the plaintiff assumed.

Defendant, The Katalla Company, for second separate and affirmative defense, alleges:

I.

That if plaintiff was injured on or about the 7th day of August, A. D. 1911, said injuries were caused by the negligence or contributory negligence of the plaintiff and of or by the negligence of a fellow-servant.

WHEREFORE, defendant, the Katalla Company,

requests that this case be dismissed, with costs to plaintiff.

R. J. BORYER,

Attorney for Defendant, The Katalla Company.

United States of America,

District of Alaska,—ss.

George Geiger, being first duly sworn, upon his oath deposes and says:

That he is Superintendent of the Copper River & Northwestern Railway Company and attorney in fact for the transaction of all business for the Katalla Company, at Cordova, Alaska; that he had read the answer in this action, knows the contents thereof and that the same are true.

GEORGE GEIGER. [16]

Subscribed and sworn to before me this 7th day of June, A. D. 1912.

[Seal]

R. J. BORYER,

Notary Public in and for the District of Alaska,
Residing at Cordova.

This is to certify that the above is a true and correct copy of the original answer in this case.

R. J. BORYER,

Attorney.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 8, 1912. Ed. M. Lakin, Clerk. By V. A. Paine, Deputy. [17]

In the District Court for Alaska, Third Division.

C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY, a Corporation, et al.,

Defendants.

Reply to Affirmative Answers of Both Defendants.

Now comes the plaintiff, by his attorney, and for Reply to the separate affirmative answers of the defendants (both said answers being identical as to facts alleged) says:

I.

Referring to first affirmative answer, plaintiff denies all and singular the allegations therein contained.

II.

Referring to the second affirmative answer of defendants, plaintiff denies all and singular the allegations therein contained.

J. H. COBB,

Attorney for Plaintiff.

United States of America,

District of Alaska,—ss.

Daniel S. Reeder, being first duly sworn, on oath deposes and says: I am the plaintiff above named. I have read the above and foregoing Reply, know the contents thereof, and the same is true as I verily believe.

DANIEL S. REEDER.

Subscribed and sworn to before me this 24th day of August, 1912.

[Seal]

J. H. COBB,

Notary Public in and for Alaska. [18]

Service admitted this 20th day of November, 1912.

R. J. BORYER,

Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 22, 1913. Ed. M. Lakin, Clerk. [19]

[Minutes of Trial.]

*In the District Court for the Territory of Alaska,
Third Division.*

Special April, 1913, Term—April 24th—13th Court
Day—Thursday.

C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER &
NORTHWESTERN RY. CO.,

Defendants.

Now, on this day, the trial of the above-entitled cause came on regularly for trial; J. H. Cobb appearing as attorney for plaintiff; R. J. Boryer appearing as attorney for defendants, and both parties announcing their readiness for trial, the following per-

sons were selected and sworn to try the issues in this cause:

- | | |
|---------------------|-----------------------|
| 1. Z. L. King, | 7. E. F. Bell, |
| 2. W. M. Trout, | 8. E. E. Chamberlain, |
| 3. Jos. Lee, | 9. A. S. Jensen, |
| 4. Jas. A. Clinton, | 10. Jos. Bourke, |
| 5. S. E. Hood, | 11. L. C. Townsend, |
| 6. L. H. Pederson, | 12. T. P. Murphy. |

Whereupon Elmer Wood was sworn and testified as witness on behalf of the plaintiff.

Whereupon Daniel S. Reeder was sworn and testified as a witness in his own behalf.

Whereupon Jas. McGill, Carl Johnson were sworn and testified as witnesses on behalf of the plaintiff.

Whereupon Plaintiff's Exhibits "A" and "B" were offered and admitted in evidence.

Whereupon Chris. Likeits and John Reidy were sworn and testified as witnesses on behalf of the plaintiff. [20]

Whereupon Plaintiff's Exhibits "C" and "D" were offered and admitted in evidence.

Whereupon A. M. Kinney was sworn and testified as witness on behalf of the plaintiff.

Whereupon Plaintiff's Exhibits "E" and "F" were offered and admitted in evidence.

Whereupon Daniel S. Reeder was sworn and testified further in his own behalf.

Whereupon, it being the hour of adjournment, the further trial of this cause is continued until to-morrow at the hour of ten o'clock A. M.

Entered Court Journal No. C.—2, page No. 53.
[21]

*In the District Court for the Territory of Alaska,
Third Division.*

Friday, April 25th, 1913—14th Court Day. Special
April, 1913, Term.

Entered Court Journal No. C.—2, Page No. 54.

C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER &
NORTHWESTERN RY. CO.,

Defendants.

Trial Continued.

Now, on this day, the trial of the above-entitled cause came on again regularly for trial; J. H. Cobb appearing as attorney for the plaintiff; R. J. Boryer appearing as attorney for defendants; came the jury, heretofore impaneled and sworn herein, and being called and each answering to his name, the following proceedings were had and done, to wit:

Whereupon Daniel S. Reeder resumes the stand and testifies further in his own behalf.

Whereupon Defendants' Exhibits 1, 2, 3, 4, 5, and 6 were offered and admitted in evidence.

Whereupon Mrs. Daniel S. Reeder was sworn and testified as a witness on behalf of the plaintiff.

Whereupon W. H. Chase and H. C. Feldman were sworn and testified as witnesses on behalf of the plaintiff.

Whereupon Plaintiff's Exhibits "G" and "H" were offered and admitted in evidence.

Whereupon plaintiff rests.

Thereupon counsel for defendants files his written motion for Judgment of nonsuit as to both defendants herein and after arguments had and the Court being fully advised in the premises, denies said motions to which order and ruling of the [22] Court defendant excepts and exception is duly allowed.

Whereupon Karl Lekeits was recalled and testified as a witness on behalf of the defendants.

Whereupon J. W. Forrester and F. H. Estabrook were sworn and testified as witnesses on behalf of the defendants.

Whereupon defendants rest.

Thereupon counsel for defendants files his written motions for a directed verdict on behalf of both parties, which said motions were by the Court denied.

Whereupon, it being the hour of adjournment, the further trial of this cause is continued until to-morrow at the hour of ten o'clock A. M. [23]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER &
NORTHWESTERN RY. CO.,

Defendants.

Motion [of Katalla Co.] for Nonsuit.

Comes now the defendant, the Katalla Company, by its attorney, R. J. Boryer, and moves the Court to grant a nonsuit to this defendant for the reasons:

I.

That the plaintiff has closed his case and has failed to establish that the Katalla Company was a common carrier at the time that the plaintiff was injured, and failed to establish that the Katalla Company was doing a common carrier business over the line and at the place where the plaintiff was injured.

II.

That this action is brought under the Federal Employers' Liability Acts of 1906, 1908 and 1910, which is in derogation of the common law, and having failed to establish that the Katalla Company was doing a common carrier business at the time of the injury to plaintiff and over the line at the point where the plaintiff was injured, cannot recover at common law in this action.

III.

For the further reason that the evidence in the case introduced by the plaintiff conclusively shows that the plaintiff was employed in retimbering and strengthening of the tunnel upon which he was working for the purpose of making said [24] tunnel safe, and that he was injured by reason of one of the hazards incident to his work which he knew while working on said tunnel.

IV.

For the further reason that the evidence shows

that the plaintiff was a co-laborer and a fellow-servant of the laborer who knocked the brace off of the frame-work of the tunnel and that the knocking off of the brace in said tunnel was the cause of the cave-in which injured the plaintiff.

V.

For the further reason that the plaintiff has failed to establish his case.

R. J. BORYER,

Attorney for Defendant, Katalla Company.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [25]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER
& NORTHWESTERN RAILWAY COM-
PANY,

Defendants.

**Motion [of Copper River & N. W. Ry. Co.] for
Nonsuit.**

Comes now the defendant, the Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, and moves the Court to grant a nonsuit to this defendant for the reasons:

I.

That the plaintiff has closed his case and has failed to show that the plaintiff was employed by the Copper River & Northwestern Railway Company, and has failed to show that the plaintiff was in the employ of the Copper River & Northwestern Railway Company at the time that he received his injury complained of in this action.

II.

For the further reason that the plaintiff has failed to show that the defendant, Copper River & Northwestern Railway Company, was doing a common carrier business at the time the plaintiff was injured as alleged in his complaint, and for the further reason that the plaintiff has failed to show that the Copper River & Northwestern Railway Company was doing a common carrier business over the line and at the place where the plaintiff received his injury, and for the further reason that this action is based upon the Federal Employers' Liability Act as passed by Congress of United States in 1906, 1908 and 1910, which act precludes a recovering at common law.
[26]

III.

For the further reason that the evidence shows that the plaintiff was employed at and was engaged in retimbering, strengthening and making an unsafe tunnel safe, which facts were admitted by the plaintiff to be known by him prior to the happening of his injury and was injured by reason by one of the risks incident to his work.

IV.

For the further reason that the plaintiff has failed to show that this defendant failed and neglected to suitably timber the said tunnel so as to protect the workmen, by using old and weaken timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon.

V.

For the further reason that the plaintiff has failed to establish his case against this defendant.

VI.

For the further reason that the plaintiff has admitted that he was familiar with and knew all of the dangers incident to his work and by which he was injured.

R. J. BORYER,

Attorney for Defendant, Copper River & Northwestern Railway Company.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [27]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER
& NORTHWESTERN RAILWAY COM-
PANY,

Defendants.

**Motion [of Copper River & N. W. Ry. Co.] for
Directed Verdict.**

Comes now the Copper River & Northwestern Rail-
way Company, by its attorney, R. J. Boryer, and
moves the Court for a Directed Verdict in this action,
for the reasons:

I.

That the plaintiff has closed his case and has failed
to show that the plaintiff was employed by the Cop-
per River & Northwestern Railway Company, and
has failed to show that the plaintiff was in the employ
of the Copper River & Northwestern Railway Com-
pany at the time that he received his injury com-
plained of in this action.

II.

For the further reason that the plaintiff has failed
to show that the defendant, Copper River & North-
western Railway Company, was doing a common car-
rier business at the time the plaintiff was injured as
alleged in his complaint, and for the further reason

that the plaintiff has failed to show that the Copper River & Northwestern Railway Company was doing a common carrier business over the line and at the place where the plaintiff received his injury, and for the further reason that this action is based upon the Federal Employers' Liability Acts as passed by Congress of the United States in 1906, 1908 and 1910, which Acts preclude a recovering at common law.

[28]

III.

For the further reason that the evidence shows that the plaintiff was employed at and was engaged in re-timbering, strengthening and making an unsafe tunnel safe, which facts were admitted by the plaintiff to be known by him prior to the happening of his injury, and was injured by reason by one of the risks incident to his work.

IV.

For the further reason that the plaintiff has failed to show that this defendant failed and neglected to suitably timber the said tunnel so as to protect the workmen, by using old and *weaken* timber and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon.

V.

For the further reason that the plaintiff has failed to establish his case against this defendant.

R. J. BORYER,
Attorney for Defendant, Copper River & Northwestern Railway Company.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [29]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER
& NORTHWESTERN RAILWAY COM-
PANY,

Defendants.

Motion [of Katalla Co.] for Directed Verdict.

Comes now the Katalla Company, by its attorney, R. J. Boryer, and moves the Court for a Directed Verdict in this action for the reasons:

I.

That the plaintiff has closed his case and has failed to establish that the Katalla Company was a common carrier at the time that the plaintiff was injured, and failed to establish that the Katalla Company was doing a common carrier business over the line and at the place where the plaintiff was injured.

II.

That this action is brought under the Federal Employers' Liability Acts of 1906, 1908 and 1910, which is in derogation of the common law, and having failed to establish that the Katalla Company was a common

carrier business at the time of the injury to plaintiff and over the line at the point at which the plaintiff was injured, cannot recover at common law in this action.

III.

For the further reason that the evidence in the case introduced by the plaintiff conclusively shows that the plaintiff was employed in retimbering and strengthening the tunnel upon which he was working for the purpose of [30] making said tunnel safe and that he was injured by reason of one of the hazards incident to his work which he knew while working on said tunnel.

IV.

For the further reason that the evidence shows that the plaintiff was a co-laborer with and a fellow-servant of the laborer who knocked the brace off of the frame-work of the tunnel, and that the knocking off of the brace in said tunnel was the cause of the cave-in which injured the plaintiff.

V.

For the further reason that the plaintiff has failed to establish his case.

VI.

For the further reason that the plaintiff has admitted that he was familiar with and knew all of the dangers incident to his work and by which he was injured.

R. J. BORYER,

Attorney for Defendant, Katalla Company.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 25, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [31]

[Minutes of Trial—Continued.]

*In the District Court for the Territory of Alaska,
Third Division.*

Special April, 1913, Term—April 26th—15th Court
Day.

Entered Court Journal No. C.—2, Page No. 56.
C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

THE KATALLA COMPANY and THE COPPER
RIVER & NORTHWESTERN RAILWAY
COMPANY,

Defendants.

Now, on this day, the trial of the above-entitled cause came on again regularly for trial; J. H. Cobb appearing for the plaintiff; R. J. Boryer appearing for defendants. Came the jury, heretofore impaneled and sworn herein and being called and each answering to his name, the following proceedings were had and done, to wit:

WHEREUPON arguments were made by counsel for plaintiff and counsel for defendant, the jury was duly instructed as to the law in the premises and retire in charge of their sworn bailiffs for deliberation upon their verdict herein, and thereafter return-

ing into court, present by and thru their foreman, in their presence in open court, their verdict, which is in words and figures as follows, to wit: [32]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY, a Corporation, and
COPPER RIVER & NORTHWESTERN
RAILWAY CO., a Corporation,

Defendants.

Verdict.

We the jury, duly selected, impaneled, sworn and charged in the above-entitled action, do find for the plaintiff and against the defendants, and each of them, and assess plaintiff's damages at \$5,000.00.

Dated at Cordova, Alaska, this 26th day of April, 1913.

JOSEPH A. BOURKE,

Foreman.

WHEREUPON said verdict is ordered filed and entered by the clerk and the jury are excused from further deliberation herein. [33]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 19, 1913. E. W. Pettit, Clerk. By —————, Deputy.

Filed in the District Court, Territory of Alaska,
Third Division. Jul. 29, 1913. Arthur Lang, Clerk.
By V. A. Paine, Deputy. [34]

[Transcript of Testimony, etc.]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER &
NORTHWESTERN RAILWAY COM-
PANY,

Defendants.

BE IT REMEMBERED, that the above-entitled
cause came on duly and regularly to be heard at Cor-
dova, Alaska, in said Third Judicial Division, on
Thursday, the 24th day of April, 1913, at 10 o'clock
A. M., before the Honorable PETER D. OVER-
FIELD, Judge of said Court, and a Jury:

The plaintiff herein being represented by his
attorney and counsel, JOHN H. COBB, ESQ.,

The defendants herein being represented by their
attorney and counsel, R. J. BORYER, ESQ.

The Jury having been empanelled, opening state-
ments were made by the respective attorneys in be-
half of the plaintiff and defendants herein:

WHEREUPON the following additional proceed-
ings were had and done, to wit: [35]

Before empanelling of the Jury—

By Mr. BORYER.—At this time I desire to take

an exception to the excusing of the jurors that were called upon the special venire.

By the COURT.—The exception will be allowed.

[Examination of Jurors.]

Examination of Juror Soule.

(By Mr. BORYER.)

Q. You reside in Valdez? A. Yes.

Q. Have you heard anything of the facts in this case? A. No, sir.

Q. Are you acquainted with Mr. Reeder?

A. No.

Q. Have you any prejudice for or against corporations? A. Not in the least.

Q. Have you any prejudice against either of the defendant corporations, the Katalla Company or the Copper River & Northwestern Railway Co.?

A. No, sir.

Q. If you are selected as a juror in this case will you be guided exclusively by the evidence and the instructions of the court in arriving at your verdict?

A. Yes, sir.

Mr. BORYER.—We pass the juror for cause.

(By Mr. COBB.)

Q. What is your occupation?

A. I am a civil engineer.

Q. You say you have no prejudice against the defendants—have you any bias in their favor?

[37*—2†] A. No, sir.

Q. Have you been endeavoring to get employment

*Page-number appearing at foot of page of certified Transcript of Record.

†Original page-number appearing at foot of page of Bill of Exceptions as same appears in Certified Transcript of Record.

from them lately?

A. Never asked for a job from them in my life.

Q. Have you been endeavoring to get employment from any of the allied corporations? A. No, sir.

Q. Are you acquainted with Mr. Boryer?

A. I have met him since I have been in Cordova, coming to Cordova.

Q. Have you been to his office since you have been down here?

A. I think probably once I have been in his office; that was probably a year and a half ago.

Q. Since you have been down here this time?

A. Not this time, no.

Mr. COBB.—Pass for cause. Later—

Mr. COBB.—I would like to ask Mr. Soule another question.

By the COURT.—Very well.

Q. Did you serve upon a regular panel or grand jury within the last year?

A. Yes, I served on the regular panel in Cordova last fall.

Mr. COBB.—We submit a challenge for cause.

By the COURT.—Mr. Soule will be excused.

Mr. BORYER.—We desire an exception to the ruling.

Exception allowed.

Examination of Juror McNiece.

(By Mr. BORYER.)

Q. You reside in Valdez? A. Yes.

Q. How long have you resided in Valdez?

[38—3] A. About three years and a half.

Q. Have you served as a juror within the past

year in this division, in this court, as a juror or grand juror? A. Just on a special venire, one case.

Q. Where was that? A. Valdez.

Q. At what term of court?

A. The last term of court at Valdez.

Q. What month was that?

A. That was about two months ago.

Q. Not over two months ago?

A. No, not over two months ago.

Mr. BORYER.—We challenge the juror for cause.

(By the COURT.)

Q. You were just called to serve on one case?

A. Yes, a special venire, on one case.

Q. And you were excused immediately after the one case? A. Yes, sir.

By the COURT.—The challenge will be denied.

Defendant allowed an exception to the ruling.

[Proceedings Had—After Impanelment of Jury.]

The empanelling of the Jury having been completed—

By the COURT.—Before the jury is sworn I am going to ask you two questions: assuming, not that you have not answered them correctly, but that you may not have been asked the exact questions, at least in a pointed way and in my desire to have a jury that are absolutely qualified, I want to know, first, whether any one of you feel that you are so constituted mentally or by reason of experiences you have [39—4] had in life that you feel that when a man is injured you have a more than natural sympathy for that man, so that you feel it would be very difficult for you to follow the instructions of the

Court in this case, which will be that you must not allow sympathy to actuate you in the least in reaching your verdict. In answering that question I want each of you to feel just as free and not hesitate in the least in saying so to me—Does any one of you feel that you are in such a position with reference to this case, if you do I wish you would indicate it to me freely and frankly—Does anyone feel that way? If you do, just raise your hand so I may know. (After a pause:) I see no hand raised. The next question I am going to ask you is this: In view of the fact that there are rival towns here in Alaska to a certain extent—I don't say they are rivals, but in the matter I am going to ask you about it is possible, that is in reference to railroads—referring, now, to the towns of Cordova, Valdez and Seward—I assume that there are jurors from all three towns—Would the fact that some of you are from a town other than Cordova lead you to have a prejudice against the defendants in this case, the companies, so that you feel that that fact alone may influence you—that you may be influenced to render a verdict against them by the mere fact alone that you live in Seward or live in Valdez—I want you to be just as free in answering that question under your oaths as the other question—If any man feels that way, that there is a possibility of it, raise your hand. (After a pause) I see none.

Mr. HUNT.—I would like to ask along those lines whether having served on the last grand jury the same time that Mr. [40—5] Swan did has any weight.

By the COURT.—Yes.

Mr. HUNT.—Then I will say that I was on the same panel.

By the COURT.—Were you regularly—

A. At this session, special, to fill the grand jury.

By the COURT.—I have to be consistent in my ruling—I will allow you to be excused.

Mr. BROWN.—I am in the same position; I served as a special.

Mr. BROWN excused.

Mr. COBB.—They don't claim it as an exemption.

By the COURT.—I am not sure about it. I can't tell from the code and I haven't the Revised Statutes.

Mr. COBB.—The code hasn't anything to do with it—it is governed by the Revised Statutes.

By the COURT.—My opinion is that a rule of this kind is to prevent professional jurors and I have to keep that in mind in my rulings.

Mr. COBB.—That is the reason why special veniremen are not excluded.

The jury being completed—

By the COURT.—Now, if there are any other reasons why any juror feels he should not serve on the jury you may make it known. (No answer.)

By the COURT.—The jury may be sworn.

Mr. Cobb makes his opening statement; followed by Mr. Boryer.

By the COURT.—Call your first witness.

Mr. COBB.—I will call Mr. Wood. [41—6]

[Testimony—Plaintiff's Case.]

[Testimony of E. F. Woods, for Plaintiff.]

E. F. WOOD, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. Cobb.)

Q. What is your name? A. E. F. Wood.

Q. Where do you reside? A. Cordova.

Q. How long have you resided here?

A. Four years, off and on.

Q. What is your occupation?

A. Bridge-man and pile-driver.

Q. Have you ever worked for the defendant companies? A. I have.

Q. Where were you employed last August, a year ago—August, 1911? A. At Chitina.

Q. What were you doing?

A. Well, repairing up some old work, some old bents, on this end of the tunnel, on the Chitina end.

Q. Near Mile 131? A. Yes, sir.

Q. What road was that on?

Mr. BORYER.—We object to that, unless the witness knows.

By the COURT.—He ought to know; I don't know whether he does or not.

Q. Do you know what road you were at work on?

A. It was supposed to be the Copper River & Northwestern.

Q. What is known as the Copper River & Northwestern Railway line? A. Yes, sir.

(Testimony of E. F. Wood.)

Q. This is the road leading from Cordova out along the Copper [42—7] River to the interior of Alaska? A. Yes, sir.

Q. Do you remember an accident caused by a cave-in there, about the 7th? A. I do.

Q. At the particular time the accident happened, where were you?

A. I was at this end of the tunnel, as I stated before, tearing off the old work.

By the COURT.—Did the accident happen at this end of the tunnel? A. No, sir.

By the COURT.—The other end? A. Yes, sir.

Q. About how long is that tunnel?

A. Three hundred feet or a little better, I should judge—I never measured it.

Q. What time in the morning was it?

A. Somewhere around half-past 7 or 8 o'clock, as near as I can tell.

Q. Are you acquainted with the plaintiff, Dan Reeder? A. I am.

Q. How long have you known him?

A. Well, I have seen him off and on for four years.

Q. Did you see him that morning? A. I did.

Q. Where was he when you first saw him?

A. He was going into the tunnel to work—he passed just as we were working.

Q. Passed you on the way to his work?

A. Yes, sir.

Q. How long was this before the alarm of the accident was given? [43—8]

A. Not very long,—I couldn't say just how long

(Testimony of E. F. Wood.)

it was, but I know it could not have been very long before that, before we were given the alarm.

Q. Give the jury some idea of the length of time, the best you can—whether it was ten minutes or 15 minutes or 20 minutes or an hour.

A. Well, Dan just passed me—I remember hearing it spoken of next day—Dan just passed us when these other two fellows came right back and gave the alarm.

Q. It had not been but a few minutes?

A. It was not very long. I couldn't say just how long it was.

Q. How far from where you were was it, when he passed you, to the place where he was at work, about?

A. I should say about 300 ft., as I said before.

Q. When you heard the alarm, what did you do?

A. We went into the tunnel and helped him out.

Q. Tell the jury what you found, and what you did.

By the COURT.—Describe it to the jury so the jury can see what you saw.

A. The men were buried underneath the timbers and gravel and dirt, and we started in to dig them out.

By the COURT.—Stop and see how much you think the jury know of what you saw there from that statement. Put yourself in the place of the jury and try to make them see the position the plaintiff was in and as far as possible draw a picture of what you saw there, in your own mind.

The WITNESS.—The timbers were all broke down, and the dirt was on top of them, and the men were underneath there and they were calling on us

(Testimony of E. F. Wood.)

to get them out; the men were alive,—they knew us.

Q. Go ahead—tell what you did, and what you found as you dug [44—9] down there?

A. Well, we dug down, and we got them out. I only seen two taken out, because I got hurt myself then, and had to leave the tunnel before they were all taken out.

Q. Who was it you saw taken out?

A. I saw Mr. O'Neil, and I saw—he was the only one I knew.

Q. What condition was he in?

Mr. BORYER.—We object to that.

Objection sustained.

Q. How many men were killed underneath that cave-in there?

Mr. BORYER.—We object to that as irrelevant and immaterial.

Objection sustained.

Q. How long were you there before you got hurt?

A. I was probably there three hours or more.

Q. Did you see Mr. Reeder when he was taken out?

A. No, sir; I left the tunnel before he was taken out.

Q. You left before they got him out? A. Yes.

Q. Now, I want you to tell the jury the best you can what condition Mr. Reeder was in when you got there, and during the time you were there working to get him out—what he was undergoing, if he seemed to be undergoing anything. Try to give the picture that is in your mind of Mr. Reeder when he was

(Testimony of E. F. Wood.)

underneath there, and how he was buried, and all about it.

Mr. BORYER.—We object to the question, unless it is shown that he knows what the plaintiff was undergoing.

By the COURT.—He may answer the question.

Defendant allowed an exception.

A. He was buried under the timbers and I heard him talking, but I couldn't see him. He must have been suffering, because I [45—10] heard him call on the boys to stop them sawing, and come *and come* and get him.

Mr. BORYER.—We move to strike the answer as a conclusion and not responsive to the question.

Motion denied. Defendant allowed an exception.

Q. Go ahead and tell all you remember about it.

A. That is about all I remember. I heard him call on the boys just before I left, telling them to stop them sawing the timber that was across him. His boys were working on the other side of the tunnel, and there were men there working over Dan that were not experienced men, and he called on the boys to come over and make them stop,—I remember that.

Q. During all this time that you were there, about three hours, he was in the place where he was caught when the roof fell? A. Yes.

Q. About what time in the day was it when you got hurt and was taken away?

A. I couldn't just say,—along toward noon.

Q. You think you had been there about three hours? A. Yes, sir; something like that.

(Testimony of E. F. Wood.)

Mr. COBB.—That will be all.

Cross-examination.

(By Mr. BORYER.)

Q. You say you have known Reeder about four years?

A. Well, I have seen him—I haven't known him that long.

Q. Where did you first become acquainted with Reeder?

A. I have seen him along the road,—I think it was on the Chitina bridge, if I am not mistaken, working on the Chitina bridge.

Q. Working on the Chitina bridge?

A. Yes, sir. [46—11]

Q. That is along the line of the railroad?

A. Yes, sir.

Q. And it is part of the railroad? A. Yes.

Q. What work was he doing on the Chitina bridge, do you know?

A. He was there as a carpenter, a bridge carpenter, I believe.

Q. Working on the bridge as a bridge carpenter?

A. Yes, sir.

Q. Did you see him working anywhere else?

A. Yes, I have seen him working,—he was working there at the tunnel.

Q. Working at the tunnel? A. Yes, sir.

Q. The particular tunnel in question in this case?

A. Yes, sir.

Q. When did you first see Reeder working on that tunnel?

(Testimony of E. F. Wood.)

A. That day—I don't remember seeing him in there or working there before. I couldn't say.

Q. Had you worked around that tunnel any length of time? A. No, sir.

Q. That was your first day?

A. That was my first day.

Q. Then you don't know whether he work on that tunnel prior to that time or not? A. No, sir.

Q. What were you doing at that tunnel?

A. We had the pile-driver in there, the track-driver rather—we were tearing out some old work that was on this end of the tunnel.

Q. Tearing out some old work? [47—12]

A. Yes, sir; temporary work.

Q. For what purpose?

Mr. COBB.—We object to that; this was three hundred feet away from where this accident happened.

Objection sustained. Defendant allowed an exception.

Q. You saw Reeder that morning? A. Yes, sir.

Q. Going to work? A. Going to work.

Q. Do you know what work he was going to do?

A. No, sir.

Q. Do you know where he went?

A. He went into the tunnel.

Q. He went into the tunnel? A. Yes.

Q. Do you know what work he was doing in the tunnel? A. Not at the time; no.

Q. Do you know what work he had been doing in the tunnel? A. Carpenter.

(Testimony of E. F. Wood.)

Q. You said that you were working on the Copper River & Northwestern Railroad. Did I understand that correctly? A. Yes, sir.

Q. By that you mean the railroad running from Cordova to Chitina and beyond to the Kennecott Mines? A. Yes, sir.

Q. You didn't mean to say that you knew who owned that railroad, did you?

A. No, sir; I did not.

Q. And you don't want the jury to so understand you? [48—13] A. No.

Mr. COBB.—Do you deny that it belongs to the Copper River & Northwestern Railroad Company?

Mr. BORYER.—I expect you to make out your case.

Q. Then, as a matter of fact, the only thing you know in regard to Reeder's accident was the fact that he was in the tunnel at the time that the accident happened? A. Yes, certainly, he was in the tunnel.

Q. You were not present when the accident happened, were you?

A. I was at this end of the tunnel when the accident happened.

Q. You couldn't see it from where you were located? A. No, sir; I couldn't see it.

Q. How long have you known Reeder as a carpenter? A. Ever since I know him.

Q. About four years?

A. Yes, I suppose he was a carpenter.

Witness excused. [49—14]

[Testimony of Daniel S. Reeder, in His Own Behalf.]

DANIEL S. REEDER, the plaintiff, called and sworn as a witness in his own behalf, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name?

A. My name is Daniel S. Reeder.

Q. Where do you live?

A. I have resided in Cordova for the last—about, a little over five years now.

Q. What is your trade or occupation?

A. I generally follow steamboating; I follow carpentering when I am not steamboating.

Q. And what was your occupation in this country?

A. I was steamboating the greater portion of the time on the river steamboats for the company—I was made a pilot on one boat—

Q. Were you ever a carpenter? A. Yes, sir.

Q. When?

A. I went to work the fall of 1910. Worked a while in the fall of the year after the boat tied up and didn't do anything more until the following spring. The spring of 1911 I went to work in Chitina, in the Chitina tunnel, as carpenter, working there as carpenter.

Q. What month did you begin to work in 1911?

A. I think it was somewhere about the middle of April we started in.

Q. Who were you working for?

A. Well, I was working for the Railroad Co.—I

(Testimony of Daniel S. Reeder.)

don't know—that is about all I know. I was working for the Railroad Co.

Q. The Copper River & Northwestern Railway?
[50—15]

A. I don't know which I was working for. I think at that time I was working for the Katalla Company, the way I understood it, at that time.

Q. What made you think that?

A. Along about the middle of May the timekeeper came along and says, "We are going to change your work tags; we are going to take up all the old Katalla Co. tags and give you the new Copper River & Northwestern," and I know he changed them and I got my tag and had it up to about a month ago and lost it.

Q. I wish you would explain to the jury the difference between those tags, the Katalla Company tags and the Copper River & Northwestern tags.

A. Each and every corporation had their own brass tags,—the Heney Company had two or three or half a dozen kinds of them. The Katalla Company had a brass tag and each and every man went by his number as well as his name, because there were so many Johnsons and Petersons and Olsens and names like that that they gave them a number along the road. They changed these working tags; the Copper River & Northwestern issued their tags and they took up the Katalla Co.'s tags and gave us the new Copper River & Northwestern, and I think it was about the middle of April—I know it was when Baker was timekeeper.

Q. From that time on, you understood that you

(Testimony of Daniel S. Reeder.)

were working for the Copper River & Northwestern Railway Co.?

A. Yes, that was the understanding.

Q. What was on those tags besides the number, each one of them?

A. Well, the Katalla Company's tags had a letter K on it and then the number and the new tag had the letter C on it and [51—16] the number, and a different shaped tag.

Q. Were you tagged with a Copper River & Northwestern Railway Co. tag at the time of this accident?

A. Yes, sir.

Q. Now, coming down to the month of August, 1911, do you recall what day of the month this accident happened?

A. Yes, it happened on the 7th.

Q. Where had you been at work a few days prior to that?

A. Up to some time in July I had been up on the Kuskolina bridge, helping them finish the deck on the bridge, the Kuskolina Bridge; and I think it was some time in July we finished up there and was laid off for a week or so. I don't remember just how long. We went to work about the 16th or 18th of July, if I remember, at the Chitina tunnel, and I worked on until the accident happened—around the tunnel and over around the depot, different depots around there.

Q. Where had you been at work the days immediately preceding this accident,—what had you been doing?

(Testimony of Daniel S. Reeder.)

A. Well, I had been working in the timber gang that was setting up, reinforcing the old timbers, and we worked up to within four bents of the breast, that was as far as we could go,—the mudsills in there in this tunnel, and we had to lay off then until the excavating gang could excavate out ahead so as to get the mudsills in and the gang that was doing the timbering, the gang there under Dan Lee was sent over to finish doing a lot of work around the depot and some of them was working in the depot, that is, the passenger depot. I was helping lower the freight depot—the freight depot was a foot too high, and I think either a foot or two feet too close to the track, and we were cutting it [52—17] off. Mr. Hawkins had condemned it, being so close there that there wasn't room for a man to get between it and a box-car, and he was afraid somebody might get hurt, and he ordered it cut off so that it would stand further away from the track and that we were doing up to the morning that this happened,—I think it was three or four days that we worked in there,—I don't know, I couldn't say. It might only have been two days but it seems to me that it was three or four days.

Q. Now, at the time you had been in the tunnel, the last time preceding this accident, was there anything to indicate it was a particularly dangerous place to you men?

A. Not up to the time I left it, because we watched it then and it was considered at that time perfectly safe.

Q. Did you get any orders on this particular morn-

(Testimony of Daniel S. Reeder.)

ing to go to work any particular place?

A. Yes, we went over to work and Dan Lee, the foreman I was under—McFarland was really the carpenter boss, but he had Dan Lee under him—so Dan Lee was bossing over at the depot. And he says, “We will go over this morning and put those mudsills in and get ready to put those timbers in.” So somebody spoke about tools. “Well,” Dan said, “you won’t need many tools to put in mudsills; all you want is a spike mall to lay that,” and some of the boys spoke up and said, “I have got my tools, my tool-chest, over at that end of the tunnel”—we were over at this time at the Chitina end of the tunnel before we had gone over the hill, and I said, “All right, I won’t take any tools with me,”—my tools were all over at the depot, and we goes over and I stopped out at the end of the tunnel,—it was beyond the tunnel some distance, where we [53—18] had the timbers unloaded, and put on a pair of gum boots—I had on a pair of leather shoes—and before we went in there Dan Lee came out and said, “They haven’t got it excavated out so we can put the mudsills in, so you and Likits and Nord and Kilson,” I think that was the four, “go and dap out ahead there,” What he meant by dapping out, there is a plate running along the old timbers—right on top of the piles there is a plate runs along the wood, to cut a 12-inch dap along this plate, to let the top of the new post drop in to reinforce it, halfway between. The old posts were 12 feet apart.

Q. Can you explain it better from that drawing—

(Testimony of Daniel S. Reeder.)

what is that drawing? (Handing witness paper.)

A. This is a drawing of the decks—this is what they call the three segment set of timbers, three parts—here is the plate. There is a plate on top of each and everyone, running along the top of the posts and that plate runs right straight through, from one end to the other. We had to cut an arch through that—the new post came to the top of the plate—we had to cut a 12-inch dap and notch the block right out of that plate, halfway between the old timbers, to allow the notched piece to drop in, to go in half way between—they were four foot centres before and we were putting in halfway between.

Q. What do you mean by the posts, the uprights?

A. The uprights, yes, the upright posts. This is the lagging, this is the cap and this is the post up at the side here.

Q. The same as that is there?

A. Yes, and the plate was setting right on top of it. We went in to cut these notches in. There were four sets of old [54—19] timbers that had not been reinforced, that we didn't put timbers in between them to hold them up, and that is what we went in to cut these notches in, right in there—it was an ordinary timber, made out of native lumber.

Q. What time in the morning was it when you got there and went into the tunnel?

A. I should judge it was just a little after—we went to work at 6—I don't remember whether we went to work at 6 or 7; then it was about half-past 7, if we went to work at 7 o'clock, I should judge and

(Testimony of Daniel S. Reeder.)

possibly 8. I don't remember the time—I know I went over the hill, rode over and then I came back over to the depot and got my tools and went back in there, but just the time I couldn't say. The tunnel is about 420 feet long, if I remember right, and it is, I should judge, a third of a mile from Chitina station, about a quarter of a mile over to the further end of the tunnel.

Q. Now, at which end of the tunnel is the depot where you had worked before?

A. The depot was on the Chitina end, the opposite end from where we were working timbering the tunnel.

Q. And how far is Chitina from this place,—139 miles, is it? A. The 139 mile post stands there.

Q. The tunnel is between here and Chitina?

A. No, it is beyond Chitina—the town is just this side of the bluff that the tunnel goes through.

Q. Then the depot was on the side of the tunnel towards the town of Cordova? A. Yes, sir.

Q. You passed the station before you went in?

A. Yes, sir. [55—20]

Q. Which end of the tunnel was it that the cave-in in which you were hurt occurred?

A. Well, the cave-in was over near the middle of the tunnel, but we were working from the Kennecott or the further end of the tunnel from here; it was just a little, if I remember right, beyond the middle of the tunnel. I don't know exactly the distance. I think it was just a little beyond the middle where this cave-in occurred, where I got hurt.

(Testimony of Daniel S. Reeder.)

Q. When you went over the hill to get your tools and went back there, how long had you been in there before the accident?

A. I don't know. Just barely laid my tools down, —to tell the truth about it, I had my tools in my hand up to the time I laid them down and I heard somebody say, "Look out"—I saw the dirt raveling, and started to run, and if I had got down to the next link of plank I would have been out of there and wouldn't be hurt, but as the planking went down, my hand caught the next link of staging and I went down among the braces.

Whereupon, the hour of 12 having arrived, Court took a recess until 2 P. M.

AFTERNOON SESSION.

Mr. COBB.—I ask leave to withdraw the witness I had on the stand and call another witness.

By the COURT.—Very well.

Mr. COBB.—I will call Mr. McGill. [56—21]

[Testimony of James McGill, for Plaintiff.]

JAMES MCGILL, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. James McGill.

Q. What is your age? A. 49.

Q. What is your occupation?

A. I am a bridgeman.

Q. Where are you employed now?

A. I am employed on the dock at present.

(Testimony of James McGill.)

Q. Are you working for the defendant company?

A. Working for the Railroad Co.

Q. How long have you been residing here in Cordova and in this immediate vicinity?

A. Why, I have been here for—you mean this last time?

Q. About how long?

A. I have only been here three weeks.

Q. I am talking about this part of Alaska?

A. I have been here for twelve years.

Q. Were you here in this part of the country during the year 1911? A. Yes, I was here in 1911.

Q. Where were you working that summer?

A. I was working for the Katalla Co.

Q. Where?

A. All the way along the line of railroad.

Q. Which line do you refer to?

A. The Copper River & Northwestern.

Q. The Copper River & Northwestern Railway?

A. Yes. [57—22]

Q. How long did you work for the Katalla Co.?

A. Well, I think I worked for the Katalla Co. all the time—I think it was Katalla Co.'s checks.

Q. Were you tagged? A. Yes.

Q. With the K. Company check?

A. With the K. Company check.

Q. Was that check changed at any time?

A. No, sir.

Q. Not with you? A. No, sir.

Q. Never changed?

A. It was never changed with me.

(Testimony of James McGill.)

Q. You are still working then for the Katalla Co.?

A. Not now, not this last time, not this spring.

Q. When was the change made with you?

A. Since I went to work the last three weeks.

Q. Then did you get a new tag? A. Yes.

Q. What sort of a tag is that?

A. It was just about the same tag.

Q. Any different lettering on it? A. No.

Q. Was it still marked K. Company?

A. I am not sure,—I didn't pay much attention to it.

Q. Is it marked C. Company?

A. I think I have the check with me here—it is K. Company.

Q. That is one of the old Katalla Co.'s checks?

A. That is the check I have now. [58—23]

Q. Where were you at work in the early part of the month of August, 1911?

A. I don't remember just where I was at that time because we were moving all the time.

Q. You can tell the jury about where you were working, give them an idea?

A. Well, around Chitina, on the branch I think.

Q. How far from Mile 131?

A. I don't know just where Mile 131 is, not exactly.

Q. You know where the tunnel out there is?

A. Yes.

Q. How far from that tunnel?

A. About half a mile.

Q. From which end of it? A. The north end.

Q. That is the end beyond the tunnel from the town

(Testimony of James McGill.)

of Cordova? A. Yes, sir.

Q. What were you doing?

A. I was working on the bridge.

Q. The Railroad Co.'s bridge? A. Yes.

Q. Now, do you remember anything occurring on or about the 7th day of August of that year in the tunnel? A. I don't remember.

Q. Is there any particular reason why you don't want to tell the jury what you know about this case?

A. There is no reason.

Q. Do you tell the jury that you don't remember the accident in the tunnel?

A. I remember the accident in the tunnel, but I don't remember the date. [59—24]

Q. You remember the accident in the tunnel?

A. Yes, sir.

Q. It occurred early in August?

A. It occurred early in August.

Q. As a matter of fact, it occurred on the 7th. Now, where were you at the time the accident occurred on that day?

A. I was working on the approach to the tunnel.

Q. What time did you go to work on that morning? A. 7 o'clock.

Mr. BORYER.—At this time, if the counsel would designate to the witness which accident he means—I think there were two accidents,—one prior to the time that Reeder was injured.

Mr. COBB.—I am talking about the one in which Mr. Reeder was hurt and other men killed and others hurt—you remember that accident? A. Yes, sir.

(Testimony of James McGill.)

Q. At which end of the tunnel were you at work, —the one furthest from the town of Cordova?

A. No.

Q. The one this way? A. The one this way.

Q. About the time that you went to work or shortly thereafter, did you see Mr. Reeder? A. Yes.

Q. Where did you see him?

A. He was going through into the tunnel.

Q. What time was that? A. About 7:45.

Q. Shortly after you began to work?

A. Yes, sir. [60—25]

Q. Is there anything particularly to fix the time on your mind? A. No.

Q. But you just estimate it as 7:45, a short time after you went to work? A. Yes, sir.

Q. You say he was going into the tunnel?

A. Yes, sir.

Q. He passed by you where you were at work?

A. Yes, sir.

Q. I will ask you if after that there was any alarm given of an accident? A. Yes, there was.

Q. How long after Reeder passed you?

A. Why I should judge between 20 and 30 minutes.

Q. You didn't keep any account of the time, of course? A. No.

Q. You just estimated that length of time?

A. Yes, sir.

Q. Just a short time? A. Yes, sir.

Q. Tell the jury what sort of an alarm that was and what occurred.

A. Why men that were in the tunnel, they came

(Testimony of James McGill.)

over to get some tools, peavies and tools to work in the tunnel and told us that the tunnel had caved in—that is all.

Q. What did you do then?

A. We went over and helped dig them out.

Q. At that time was it necessary to go overland to get to the other portal of the tunnel? A. Yes.

[61—26]

Q. You had to go over the hill? A. Yes, sir.

Q. The tunnel was not completed?

A. It was completed, yes.

Mr. BORYER.—It was filled in by reason of a previous cave.

By the COURT.—But the tunnel had been completed at one time so they could go through?

Mr. BORYER.—Yes, sir.

Q. When you got over there—did you go at once?

A. Yes.

Q. As fast as you could? A. Yes, sir.

Q. When you got over there, just tell the jury what you saw around there and all about it,—just as though they wanted to get information from you and you were trying to give it to them—just as you saw it; give them the same picture you have in your own mind.

Mr. BORYER.—We object to the witness answering the question unless it is confined to the plaintiff in the case.

By the COURT.—Yes, the surrounding circumstances—of course he cannot confine it so he has to exclude the conditions that he saw pertaining to this

(Testimony of James McGill.)

plaintiff—give the surrounding circumstances as you saw them there as near as you can.

A. Well, when we went into the tunnel the men—there was quite a few of them—they were caught in the timber.

Q. Explain to the jury how they were caught—turn to the jury and make them see it as you saw it.

A. They were all mixed up with the timber, that is the only thing I can say—they were mixed up with the timber, tangled up with the timber and dirt. I couldn't say in what [62—27] position they were in.

Q. Tell the jury whether or not these timbers were the cross-ties or the pieces from above or the side pieces.

A. Why, they were the main timbers, the posts—the main timbers or posts and the braces.

Q. Anything from the roof?

A. There was nothing from the roof—there was just the three sets, if I remember right, the three sets of timber.

Q. From the roof?

A. Yes, posts—there was nothing only the posts and the braces, that was all.

By the COURT.—Was the accident by reason of the pressure on one side or the other side or by reason of the pressure on top or pressure all the way around, if you know from the looks of it, or state what it showed with reference to that point.

A. The way it looked to me it caved in from all around, from on top and from the sides both—I

(Testimony of James McGill.)

don't know where the pressure came from; I had not been in the tunnel and don't know how it looked in there or how the timbers were on or how the roof was.

By the COURT.—I will ask another question, with the permission of the attorneys. Was there ground all the way around so it was a solid block at this particular point,—had the dirt followed the timbers in? A. The dirt followed the timbers in.

Q. Had you ever been through the tunnel before?

A. Yes, sir.

Q. Often? A. Yes, quite often.

Q. Do you know when the tunnel was first completed, about when? [63—28]

A. I don't know for sure just what date.

Q. Some time in 1910?

A. Some time in 1910, I think.

Q. And they ran trains through it a while?

A. Yes, they ran trains through it.

Q. When was the first cave in, that which Mr. Boryer mentioned, about when?

A. Well, it was in 1911.

Q. How long before this particular one that you have been telling the jury about?

A. I don't just recollect now, it might have been the latter part of May, I am not sure.

Q. The latter part of May, 1911?

A. Yes.

Q. Now, was the cave-in that occurred in May, 1911, at the precise place where the cave-in in August was? A. Close to it, I think.

(Testimony of James McGill.)

Q. That was another part of the tunnel that caved in in August and caught Reeder?

A. It had caved in there before.

Q. At this precise point? A. Yes.

Q. The timbers had given way before that, before that time, or do you know?

A. Well, the tunnel had been timbered and they had taken the timber out and the timber had caved in and they were timbering the tunnel.

Q. How is that?

A. The tunnel had been timbered and it caved in and they were timbering the tunnel again at that time—there was a small cave before this. [64—29]

Q. (By Juror TROUT.) I want to ask if that tunnel had been lagged up—had it been lagged overhead and at the sides.

A. I don't know, I am sure,—I expect it had.

Mr. COBB.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. You are working for the company at the present time? A. Yes, sir.

Q. Have you ever talked to anyone connected with the company in regard to this accident?

Mr. COBB.—We object to that,—he should ask whether he has talked with counsel for the plaintiff and not the defendant.

By the COURT.—Objection overruled. He may say whether he has talked to anybody or not.

A. No, I never did.

Q. And you say you were working on the line of

(Testimony of James McGill.)

road that extends from Cordova to Chitina during that time,—by that I mean that you were working on the roadbed that extends from Cordova up beyond Chitina and up to Kennecott—that is where you were working? A. Yes, sir.

Q. And that is what you mean by saying that you were working on the roadbed of the Copper River & Northwestern Railway? A. Yes, sir.

Q. Do you know of your own knowledge who owns that roadbed? A. I don't know.

Q. And then what you meant was that you were working on this line of railroad that extends from Cordova to Chitina and from Chitina on up to Kennecott? A. Yes, sir. [65—30]

Q. And at the time of this accident, you were then working on what was called Chitina bridge, were you or were you not?

A. Yes, about the time of that accident.

Q. That is located about a mile from the tunnel, is it not, approximately about a mile, would you say?

A. I don't know just the distance, somewhere about that.

Q. At the time of the accident in the tunnel in which Reeder was in, were you on the end of the tunnel toward Kennecott or the end of the tunnel toward Chitina? A. Chitina.

Q. Toward the Chitina end? A. Yes.

Q. What end do they usually designate that as, in regard to direction—do they call it the east end?

A. Well, I don't know what they call it but I don't think it is east.

(Testimony of James McGill.)

Q. Isn't it commonly called the west end or the Chitina end? A. Yes, sir, the Chitina end.

Q. As distinguished from the other end toward Kennecott? A. Yes.

Q. What work were you doing there?

A. We were tearing down a shed.

Q. What kind of a shed?

A. Why, it was a shed, to hold the shed they put in to keep the dirt from sloughing down the bank, to catch the dirt.

Q. You were tearing out a shed in the tunnel?

A. No, in the approach, in the cut.

Q. In the approach to the tunnel?

A. Yes, sir.

Q. Now, then, could you walk from that end that you were working, into and through the tunnel?
[66—31]

A. You could at that time.

Q. At the time that you saw Mr. Reeder there?

A. Yes.

Q. There had been a cave-in at that end of the tunnel, prior to this, had there not?

A. I think there had, if I remember right.

(By the COURT.)

Q. The question before that—was your answer that at the time Reeder was injured you could walk through? A. Yes, sir.

Q. When Reeder went to work that morning, he walked through the tunnel?

A. Yes, sir, he walked through the tunnel.

(Testimony of James McGill.)

(By Mr. BORYER—Continued.)

Q. Then he walked in through that end of the tunnel and didn't walk around the other end?

A. No, he walked through the tunnel.

Q. Did you notice if he had anything with him?

A. He had some tools, carpenter's tools—I don't remember what they were.

Q. And I believe you stated he walked in through the tunnel, as he went in the tunnel? A. Yes.

Q. From the end you were working at?

A. Yes.

Q. You didn't see the accident? A. No.

Q. Were you employed on that tunnel?

A. No.

Q. You are one of the pile-driver men, bridge men, of the company? [67—32]

A. Yes.

Q. Then that is all you know about the accident to that tunnel is it?

A. Yes, that is all I know about the accident—that is all.

Q. You were not present when it happened?

A. No.

Q. And didn't see it when it fell? A. No.

Q. About how long had this cave-in, or rather, the first cave-in—about how long was that before the cave-in that caught Mr. Reeder, approximately?

A. Well, I am not sure, I couldn't say. I think it was in May some time, the latter part of May.

Q. And this other happened the 7th of August,—about that time? A. Yes.

(Testimony of James McGill.)

Q. From the time of the first cave-in up until the time of the cave-in in which Reeder was caught were they running any trains through that tunnel?

A. Yes, I think they did—I think there were trains running through it.

Q. Was the dirt all out of it?

A. I am not sure—I think the track was clear at times.

Q. I will ask you this question, do you know if there was any trains running through there from the time of the first accident up to the time of the second cave-in? A. No, I don't know.

Mr. BORYER.—That is all.

Witness excused. [68—33]

[Testimony of Karl Johnson, for Plaintiff.]

KARL JOHNSON, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. Karl Johnson.

Q. Where do you live?

A. I have been residing around Cordova here for nearly on to five years.

Q. What is your occupation?

A. Working around pile-drivers, bridge work.

Q. That is your present occupation? A. Yes.

Q. State to the jury whether you ever did any work in tunnels.

A. I have done some work in tunnels.

Q. Whereabouts?

(Testimony of Karl Johnson.)

A. I worked up in the Chitina tunnel.

Q. Anywhere else?

A. No, that is all.

Q. You have seen the work in tunnels?

A. A good deal of it?

Q. Timbering, etc.? A. Yes, sir.

Q. Whereabouts? A. Back east.

Q. Were you employed back there on railroads?

A. No.

Q. What kind of tunnels? A. Mud tunnels.

Q. Where were you in the month of August, 1911?

A. At Chitina. [69—34]

Q. What were you doing?

A. Working in the tunnel there most of the time.

Q. Which tunnel? A. Chitina tunnel.

Q. Whose tunnel is it? Tell the jury—they don't know whether it is a mining tunnel or what it is—tell them what tunnel it was and all about it.

A. The Copper River & Northwestern Railroad tunnel.

Q. The one the line of railroad goes through?

A. Yes, sir.

Q. What were you doing in that tunnel?

A. Working with the timber gang.

Q. Why was it necessary to timber it?

A. To keep it from caving in.

Q. Had the tunnel been completed?

A. Yes, sir.

Q. When was it completed, if you know?

A. I don't remember what time it was completed.

Q. About how long before that?

(Testimony of Karl Johnson.)

A. About a year before that, I guess.

Q. And they had been operating trains through it?

A. Yes, sir.

Q. Do you remember when the first cave-in came, afterwards?

A. No, I was not around there at the time.

Q. When did you first learn about it?

A. I had been in the upper end of the branch there and came down there about the first of August.

Q. When you got there what condition did you find the tunnel in? A. It was caved in.

Q. How much of it had caved in? [70—35]

A. I think about 100 feet of it, I guess.

Q. What is the length of the tunnel about?

A. I don't remember,—I don't know how long it is.

Q. Give us some idea. A. About 400 ft., maybe.

Q. There was about 100 feet of it caved in?

A. Yes, sir.

Q. About where was that cave-in?

A. About the middle of it.

Q. About the middle of it there was about 100 ft. caved in? A. Yes.

Q. What did you go to doing?

A. Went to work in the timber gang.

Q. How were you timbering it—what sort of timbering were you putting in?

A. Putting in posts until we got to the cave-in, to strengthen the rest of the tunnel.

Q. To strengthen the rest of the tunnel?

A. Yes, sir.

(Testimony of Karl Johnson.)

Q. What was the matter with that tunnel up to where it caved in, where you were putting in these posts, that made it necessary to put in the posts?

A. The timbers were weak, I guess.

Q. Were these timbers that you speak of as being weak the original timbers, put in when the tunnel was built? A. Yes.

Q. I want you to explain to the jury why you say the timbers were weak and how they were put in there—what was the method of construction used?

A. The timber was spruce timber, round poles, put in in sets [71—36] there, bents, with lagging on it to hold the dirt up.

Q. Just repeat that.

A. It was native timber and put up in sets of bents and had lagging on it, round timber.

Q. How far apart were these posts, these up-rights? A. I should judge about four feet.

Q. About what was the size?

A. About 5 or 6 inches, I guess.

Q. And how was the roof secured by the timbers that were put on top of these posts,—what sort of timbers were those?

A. They were the same timbers, native timber.

Q. Can you give the jury some idea about the method of the construction of that roof—can you do that?

A. Yes, I think I can. (Witness makes drawing.)

Q. (By JUROR.) Where do the posts reach?

A. Up to this corner right here.

(Testimony of Karl Johnson.)

Q. (By JUROR.) And what sustained that other up there?

A. There are some joists across there.

Q. How wide is that tunnel?

A. I don't remember now.

Q. Stand up and explain what you have drawn on that paper.

A. That is the posts there and this is the joists here and this is the cap up on the top here—that is the top of the tunnel.

Q. (By JUROR.) I would like to ask the witness a question. The posts that you speak of as being about 8 inches in diameter more or less, were those of hewn or sawed timber?

A. The posts were larger—it was the top of the timber, the lagging, that was 6 inches.

Q. Were they sawed? [72—37]

A. No, they were round timbers.

Q. And are these the ones they were taking out and replacing by others?

A. No, they were just putting in others between them, in between the bents.

Q. How big were the posts?

A. The posts must have been all the way from ten to twelve inches round.

Q. I hand you a paper here and ask you if that better represents than your own drawing the way these timbers were put in.

A. These are the new sets, yes.

Q. Are those the new or old ones? The way that looks there, that would be square timbers.

(Testimony of Karl Johnson.)

Q. It wouldn't indicate whether it was square or not. I am asking more particularly about the roof.

A. Yes, sir, that is something like it.

Q. Are you sure that is the way they were put together on the roof, set in?

A. Yes, that is the way they were set in.

Mr. COBB.—I ask to have that marked Plaintiff's Exhibit "A." It is so marked.

Q. Were you in there at the time the accident occurred? A. Yes, sir.

Q. Now, just tell the jury what happened.

A. That morning when we started to work—I was shoveling that morning—I was working up ahead something like an hour I guess, shoveling gravel. That morning when we started to work, I started in there and the timber gang had caught [73—38] up with the muckers there and the timber work was kinder short and me and a couple of other fellows went to shoveling and I went up in front there and shoveled, and worked about an hour and she caved in.

Q. Did you see the cave when it started?

A. Yes, I see it slough there once or twice.

Q. I want you to tell the jury just how that came down, so they will see it just as you remember it.

A. I was working up there, along the side there, and we were shoveling out dirt from the front and from the sides and wheeling it out and dumping it into a flat car there.

Q. Now, before you go any further—where were you getting that dirt from?

(Testimony of Karl Johnson.)

A. From in front and on the sides there.

Q. The dirt that had caved in ahead of where you were working? A. Yes.

Q. The old cave-in?

A. The old cave-in, yes.

Q. And then what happened over you?

A. Why, she came down.

Q. What made it come down?

A. It was digging that dirt away, I guess, or something.

Q. The timbers gave way?

A. The timbers gave way; yes.

Q. I want you to tell the jury just what happened there.

A. As I have said, we were shoveling it out there and it came down.

Q. Whereabouts did the timbers give way—where did the timbers give way? [74—39]

A. The top gave way.

Q. The top gave way? A. The top gave way.

Q. What part of the top?

A. I don't know now. I wasn't looking up there—it all came down at once.

Q. This whole top fell out?

A. The top came right down over us.

Q. Do you know whether that is a proper construction or not to support the roof of a tunnel?

Mr. BORYER.—We object to that; he is not qualified to answer.

Q. I am asking if he knows.

By the COURT.—He may answer whether he knows.

(Testimony of Karl Johnson.)

Q. Do you know whether that is a proper construction to make the roof of a tunnel safe?

A. No, I do not.

Q. You don't know that? A. No.

Q. Did you ever see any different construction used? A. No, not as I know of.

Q. Not that you know of?

A. No—I have been in tunnels but never paid really much attention to where or how the timbers were.

Q. The new timbers that you were putting in, were they put in like that at the top?

A. I just helped raise the posts and never put in the top of them.

Mr. COBB.—That is all. [75—40]

Cross-examination.

(By Mr. BORYER.)

Q. Are you working for the company at present?

A. No.

Q. You have not been working for the company for some time?

A. No, I ain't worked for them for about three months, I guess—or two months, I guess.

Q. When did you begin working on that particular tunnel?

A. About the first day of August, 1911.

Q. And you were one of a gang that was clearing away the dirt, were you?

A. I was working in the timber gang up to about two days before the accident.

Q. And then about two days before the accident,

(Testimony of Karl Johnson.)

you began working in what gang?

A. We had to shovel out some dirt there to clear away.

Q. That was under whom?

A. That was under Mr. O'Neill, I guess.

Q. Who was your foreman in the timber gang?

A. McFarland.

Q. Do you know where McFarland is?

A. No, sir.

Q. Do you know whether he is in the country?

A. No, I do not.

Q. While you were working in the timber gang, what work were you doing?

A. Helping to raise posts and getting timbers in, mostly, was what I was doing.

Q. For what purpose?

A. For the part that didn't cave in there,—for the part of the tunnel that hadn't caved in,—strengthening the timbers. [76—41]

Q. Is that the portion that caved in and caught Mr. Reeder? A. No, sir.

Q. What portion of the tunnel were you working in? A. On the Copper River end of the tunnel.

Q. You call the Copper River end the part toward Chitina? A. No, toward Kennecott.

Q. Up toward Kennecott? A. Yes, sir.

Q. When you were located working for Mr. McFarland, sawing timbers at the timber pile, that was at that end of the tunnel were you? A. Yes, sir.

Q. Now, in order that the jury may get a clear impression of that, I will ask you if you were working

(Testimony of Karl Johnson.)

for Mr. McFarland, one of the foremen, on that tunnel. A. If I was working for him?

Q. Yes.

A. I was working for him for a while there; yes.

Q. And how many men were in your gang at the time you were working for Mr. McFarland, about how many?

A. I don't remember, about eight or ten, I guess.

Q. What were you doing?

A. We were framing timbers.

Q. You were framing timbers for what?

A. For the tunnel.

Q. Where were you framing these timbers,—where did you do your work?

A. On the outside.

Q. On the outside of the tunnel? A. Yes.

[77—42]

Q. Just on the outside of the tunnel, the end toward Chitina—is that correct? A. Yes, sir.

Q. Your work consisted of sawing and making timbers there, to be placed in the tunnel? A. Yes, sir.

Q. For what purpose?

A. For to put in between the other timbers.

Q. The tunnel had been timbered one time before that, had it? A. Yes, sir.

Q. And now you were making new timbers and putting in new timbers in the tunnel—was that in the place of old timbers or was it extra timbers that you were putting in? A. Extra timbers.

Q. For the purpose of strengthening the tunnel frame, is that correct? A. Yes.

(Testimony of Karl Johnson.)

Q. What kind of material were you using?

A. 12x12.

Q. 12x12 for what? A. For timbers there.

Q. Was that for the posts? A. Yes, sir.

Q. The 12x12 were for the posts? A. Yes, sir.

Q. What sized timbers were you using for the caps?

A. About the same size, I guess. I don't remember exactly.

Q. And the timber that crossed or went up in that shape (indicating)—what timber was that?

A. The joist I call it. [78—43]

Q. And about what sized timbers were you using for the joist?

A. About the same size, I guess. I don't remember exactly.

Q. All your timber then you think was about the same size? A. The same size.

Q. To the best of your recollection? A. Yes, sir.

Q. Was that native timber or foreign timber?

A. It was foreign timber.

Q. Oregon fir, was it not?

A. I don't know where it came from, but it was fir, I guess.

Q. And then you had, up to the time of the accident, retimbered all of the tunnel, from the Kenne-cott end towards the Chitina end, with the exception of four bents?

A. Either four or six bents—I don't remember.

Q. All of the other had been retimbered?

A. Yes.

(Testimony of Karl Johnson.)

Q. Now, then, at the time of the accident you were retimbering these four or six bents, were you not?

A. No, sir.

Q. What were you doing?

A. We were taking out the dirt.

Q. For what purpose?

A. To get in the other timbers.

Q. To retimber? A. Digging it out.

Q. First, you had to take your dirt out, in order to get your mudsills and to get your other posts, in, did you not? A. Yes, we had to dig the dirt away.

Q. And that is what you were doing?

A. Digging the dirt away. [79—44]

Q. Digging the dirt away? A. Yes.

Q. And taking it out? A. Yes, sir.

Q. For what purpose was that being done?

A. For getting into the other timbers, I guess.

Q. So as to retimber these four or six bents, was it not? A. Yes.

Q. Do you understand my question?

A. Yes, sir.

Q. For the purpose of retimbering, abstracting those other four or six bents? A. Yes, sir.

By the COURT.—You mean to retimber, putting in the same as was already down, or extra timbering?

Q. Extra timbers, was it not?

A. It was all extra timbers.

Q. You didn't take out the old timbers and put in extra timbers to make it more secure? A. Yes, sir.

By the COURT.—To get the picture a little more plainly before us—

(Testimony of Karl Johnson.)

Q. When you speak of the four or six bents, were they up there yet, or were they broken by some accident? A. No, they were there yet.

Q. Were the caps there yet? A. Yes, sir.

Q. And the lagging? A. Yes, sir.

Q. Was the dirt in under those?

A. The dirt was over them. [80—45]

Q. I mean the dirt you were working on?

A. Yes, sir.

Q. That was underneath those timbers?

A. Partly under the last bent.

Q. You were working pretty well ahead in the breast then of the four or six bents?

A. I was working on the second bent from the end.
(By Mr. BORYER—Continued.)

Q. Where had this dirt come from that you were taking out—had it fallen or was it earth you were taking out for the purpose of getting in other timbers? A. It had fallen down.

Q. It had fallen down from above?

A. Yes, it had fallen down from above.

Q. Was that part of the dirt of the other cave-in that they had had?

A. I don't know about that other cave-in.

Q. Was that close to that?

A. This last cave-in you mean?

Q. I mean the one in which Reeder was hurt—there was a cave-in before that?

A. It was all caved in there.

Q. And was this a portion of the original cave-in then? A. Part of it; yes.

(Testimony of Karl Johnson.)

Q. And the dirt you were taking out was part of the cave-in that had fallen before Mr. Reeder was hurt—is that correct? A. Yes, sir.

Q. And you were one of the carpenters that was employed to retimber and place these other timbers in and to strengthen [81—46] the tunnel?

A. Yes, sir.

Q. Now, do you recall anyone else that was in that gang of men in the carpenter gang, I mean,—yourself and who else?

A. I don't know the names of all of them. I know the names of a few of them.

Q. Name what you can. Reeder was one, was he?

A. Yes, sir.

Q. Anyone else?

A. Chris Likits was one, and John Lindquist.

Q. Anyone else?

A. Not as I know. There was quite a few men there but I don't know the names of them, though.

Q. How long had Reeder been working in this gang of men?

A. Been working there all the time I was there.

Q. And you were doing this kind of work all the time, were you? A. Yes, sir.

Q. The day before the accident happened—where were you working that day?

A. I was working in the tunnel.

Q. What were you doing in the tunnel?

A. I was digging dirt.

Q. The day before that where were you working?

A. I was working in the tunnel.

(Testimony of Karl Johnson.)

Q. Were you working as a carpenter that day—in shoveling that dirt, that was the day before that, where were you working?

A. I was working outside most of the time.

Q. Was it the day that you were working in the tunnel shoveling dirt that the cross-piece was nailed up? [82—47] A. Yes.

Q. Do you remember who nailed that cross-piece?

A. Yes.

Q. Who was that?

A. John Sutton and a fellow named Likits and myself.

Q. What did you put that cross-piece up *that* for?

A. It was put up there as a brace.

Q. A brace for what purpose?

A. For holding the bent, I guess.

Q. What was the size of that brace that you put up there?

A. 3x12, I guess—3x12 I think—a plank.

Q. Did you nail it securely?

A. We nailed it with an 8-inch spike at one end and a 60-penny nail on the other.

(By the COURT.)

Q. Where was this brace?

A. The brace was up right at the part that caved in, them four bents, I believe it was, the four bents that caved in.

Q. When did you put that on there?

A. Put it on about a week, I guess, before the cave-in.

Q. Was it just one brace you put in there?

(Testimony of Karl Johnson.)

A. That is all I put up ; yes.

(By Mr. BORYER—Continued.)

Q. I hand you this paper and ask you if you will show to the jury just where that brace was put on and what it was put on. A. I don't get that.

Q. I will ask you if this brace was placed acrossed the segments of the tunnel.

A. Yes, I believe it was. [83—48]

Q. Do I understand that the segment is the timber that connects with the upright post and with the top of the tunnel? A. Yes, sir.

Q. Then that brace was placed there by you and two other carpenters? A. Yes, sir.

Q. That is a correct representation of the brace that you put on these segments, is it not?

A. I don't remember exactly, something like that.

Q. But it was connected with these remaining bents that had not been retimbered, was it not?

A. How is that?

Q. It was connected with the bents that had not been retimbered?

A. I don't remember that exactly because I was not working there the last few days with that timber gang, when they were timbering that and I don't know exactly how that was put up there.

Q. But you put that on?

A. Yes, I put the brace on.

Q. And you were working on those four bents, were you not?

A. I was working on the bent next to the last one, shoveling dirt.

(Testimony of Karl Johnson.)

Q. That was one of the four that had not been completed? A. Yes, sir.

Q. Who told you to put that on there?

A. I believe it was Mr. Forrester.

Q. For what purpose did you put it on?

A. It was put on there as a brace for them bents, I guess. [84—49]

Q. You have had how much experience as a carpenter? A. The last five or six years.

Q. Why did he tell you to put that brace on there?

By the COURT.—If you know.

A. He didn't say what reason to put that brace on for—he just told us to put it on and that is all I know about it.

Q. And you put it on because he told you to put it on? A. Yes, sir.

Q. Do you know if it was put on there as a permanent brace?

A. It was put on there for a temporary brace, I guess.

Q. For what purpose? A. Well—

Q. Was it put on there to strengthen and hold up those timbers? A. I think it was.

Q. Did you work on that tunnel when it was originally timbered? A. No, sir.

Q. It was properly lagged, was it not?

A. Yes, as far as I could see it was properly lagged.

Q. Where were you at the time of the cave-in?

A. I was working at the second bent from the end.

Q. Was this brace left remaining while you were working there? A. No, sir.

(Testimony of Karl Johnson.)

Q. It was not? A. No, sir.

Q. Did you take it down? A. No, sir.

Q. Did you remove it? A. No, sir.

Q. Who did? [85—50]

A. Chris Likits and John Sutton, I think.

Q. Did you see them remove it? A. Yes, sir.

Q. Did you tell them not to remove it?

A. No, sir.

Q. How long after it was removed did the cave-in occur?

A. About fifteen minutes, I should think.

Q. Was it fifteen minutes?

A. I think so, about that as I can recollect.

Q. About how much work had you done between the time that this was removed and the time of the cave-in?

A. Well, I had been working quite a while, I know.

Q. What had you done?

A. I was shoveling dirt off of the sides there.

Q. And you think it was about 15 minutes?

A. About 15 minutes.

Q. You say that John Sutton and Chris Likits removed this brace? A. As I remember.

Q. Did you hear Mr. Likits say anything to Mr. Sutton when he removed this brace? A. No, sir.

Q. Who is Chris Likits?

A. He is a carpenter.

Q. What was he doing in that tunnel?

A. He was working with the timber gang.

Q. He was in the same timber gang that you were in? A. Yes, sir.

(Testimony of Karl Johnson.)

Q. In the same timber gang that Reeder was in?

A. Yes, sir.

Q. Who is John Sutton? [86—51]

A. One of the fellows that got killed.

Q. Was he working there at the time?

A. Yes, sir.

Q. In what gang was he?

A. Working in the same gang.

Q. The same timber gang? A. Yes, sir.

Q. With you and Mr. Reeder and with Mr. Likits?

A. Yes, sir.

Q. You were all engaged in retimbering and restrengthening the tunnel?

A. We were at the other end of it the three days I was there—the last days I was not with him there.

Q. That is what you were doing at the time?

A. That is what we were doing at the time.

Mr. BORYER.—That is all.

(By Mr. COBB.)

Q. That brace that was nailed on there, did it have anything to do with the roof? A. No, sir.

Q. It didn't strengthen the roof any?

A. No, sir.

Q. And it was only put up in bents of the tunnel on one side for the purpose of preventing the up-rights working back and forth? A. Yes, sir.

Q. To strengthen those? A. Yes.

Q. It didn't strengthen the tunnel any at all. It merely [87—52] stiffened it, is that it?

A. Yes, sir.

Q. You say it was the roof that gave way?

(Testimony of Karl Johnson.)

A. Yes, sir.

Q. This brace didn't tend to strengthen that any at all? A. No, not that I could see.

Q. As a matter of fact, when that brace was put up there and they drove this spike into it, it split it, didn't it?

A. I don't remember that, whether it was split or not.

Q. At which end did you drive the spike in, the one lowest toward the ground or the upper end?

A. The upper.

Q. The other end was driven with two 60-penny nails? A. Yes, sir.

Q. Will you tell the jury the length of a 60-penny nail? A. It is about 6 inches long.

Q. Was that native wood, that brace?

A. No, the brace was fir.

Q. Did you notice it at the time it was taken out?

A. Yes, sir.

Q. The 60-penny nails had pulled over half out, had they not?

A. I never notice that, whether they were pulled out or not.

Q. Now, these new timbers that you were putting in there were put in with different construction than the old timbers that they were intended to strengthen? A. Yes, sir.

Q. I hand you another drawing which I ask to have marked Plaintiff's Exhibit "B" (it is so marked), and ask you if that correctly represents the method of construction of the new timbers that

(Testimony of Karl Johnson.)

were put in. [88—53] A. Yes, sir.

Q. I want you to tell the jury the difference in the size and the strength of these timbers from the old timbers that had been used there and explain to them the difference in the construction.

A. I don't know whether I could explain that to them—I don't think I could.

Q. You mean that you don't think that you have sufficient use of language to tell it to them?

A. No, sir.

Q. It does correctly represent, however, the method in which the timbers were put together?

A. Yes, sir.

Q. Now, I want you to tell the jury the difference in the size and strength of the timbers being used in there at that time and the ones that gave way and hurt Mr. Reeder.

A. Them old timbers that were in there were all native timbers, round timbers, I judge from about ten to twelve inches, the posts and the same with the segments and the caps.

Q. How far apart were they put?

A. About four feet, I think.

Q. Now, as I understand it, these new timbers that were put in there, were being put halfway between them? A. Yes, sir.

Q. So that more than doubled the strength of the tunnel? A. Yes, sir.

Q. The old original construction, was any of that being removed? A. No, sir.

Q. It was all left there? [89—54]

(Testimony of Karl Johnson.)

A. It was all left there.

Q. And as I understand it, the accident happened by the giving way of this original construction before the new construction was put in? A. Yes, sir.

Q. And yet you tell the jury that that tunnel as originally constructed had been used for the passage of trains, etc., until a part of it had given way at one time? A. Yes, sir.

Q. Do you know whether or not the taking out of that brace by Mr. Likits had anything to do with the fall of the roof? A. No, sir.

Q. It did not? A. No, sir.

Q. That roof fell, that accident happened, by this timber being too weak?

Mr. BORYER.—We object to that as leading.

By the COURT.—He may answer that question if he knows.

A. All I know, the brace was removed and I worked about 15 minutes afterwards, and it came down and I don't remember how it came down.

Q. It was the roof that came down and not anything that this brace held?

A. It was the roof that came down.

(By the COURT.)

Q. Where did the roof come down with reference to where the brace had been taken off?

A. I don't know that.

Q. You don't know whether it came down at the same place?

A. It all came down so quick. [90—55]

Q. From about how many different bents?

(Testimony of Karl Johnson.)

A. About four, I think—four or five. I don't recollect.

Q. Were the four bents that you were working at there next to the brace? A. Yes, sir.

Q. Some time ago in your testimony you said the first thing you knew was a dropping, as I understood—you were in two different places?

A. There was a few laggings missing and the dirt worked through that.

Q. Where was that with reference to those bents, the four bents?

A. I think there was one over where Dan Reeder was working, on the right-hand side of the tunnel as you go in there.

Q. And the other?

A. That was right opposite me—I was working on the left-hand side, the second bent.

(By Mr. COBB—Continued.)

Q. That was just pieces of lagging that was out and a little dirt sifting through? A. Yes, sir.

Q. How long after you noticed that was it before the fall came?

A. About 5 or 6 minutes, I should think—shortly before, anyhow.

(By Mr. BORYER.)

Q. These timbers were standing there when you and this carpenter-gang began work in the tunnel, were they? A. Yes, sir.

Q. They remained standing there until 15 minutes after this brace was knocked off, did they?

(Testimony of Karl Johnson.)

A. Yes, sir.

Q. They had not fallen before that time?

A. No, they were still standing there.

Q. There was no cave-in underneath those four bents, was there? A. No, sir.

Q. Now, then, you say that after this brace was taken off that some dirt began to sift down where you were working and some began to sift down from the top where Reeder was working—where was it working from? A. From the sides.

Q. From each side? A. From both sides.

Q. The roof was then crumbling in from each side?

A. Yes, sir.

Q. Where you were working and where Reeder was working? A. Yes, sir.

Q. What were you doing at that particular time?

A. I was shoveling.

Q. And what was Reeder doing?

A. I think he was working making a cut for the post.

Q. Whereabouts was he making this cut?

A. On the other side of the tunnel from me.

Q. Was that across the tunnel from where this brace was taken off or where the brace was taken off?

A. It was on the other side from where the brace was taken off.

Q. Just across on the other side of the tunnel?

A. Yes, sir.

Q. About what is the width of that tunnel approximately?

A. I should judge about 18 ft., 16 or 18 ft.

(Testimony of Karl Johnson.)

Q. Did you see this brace that was taken out after the cave-in? [92—57] A. No.

Q. Were you caught in the tunnel?

A. Yes, sir.

Q. And were you unconscious? A. No, sir.

Q. Were you taken out of the tunnel or did you get out by yourself? A. I got out by myself.

Q. And then where did you go from there, after you got out of the tunnel?

A. Went out on the Copper River end of the tunnel.

Q. Toward Kennecott? A. Toward Kennecott.

Q. Where did you go after that?

A. I went back into it again.

Q. Did you help to rescue the men?

A. Yes, sir, for a while I did.

Q. For how long?

A. For about 15 minutes or 20—about 20 minutes, maybe.

Q. What did you do?

A. Helped shovel and take away timbers.

Q. Did you see this piece, this brace that had been knocked off? A. No, sir.

Q. I believe you stated that you saw that the nails that were holding this brace were pulled out from the pieces that they were nailed to? A. No, sir.

Q. You didn't mean to say that, did you, if you did say it?

A. The brace was pulled out and the nails was pulled right [93—58] with the brace to it but after they caved in, no, I didn't notice the brace.

(Testimony of Karl Johnson.)

Q. That was pulled out by a crowbar, wasn't it, the brace? When they pulled this brace off, it was pulled off by means of a crowbar?

A. No, a small pinch-bar for pulling nails with.

Q. Who was working the pinch-bar?

A. John Sutton, I believe.

Q. And then you didn't see the timber after that?

A. He took it and took it back in the tunnel somewhere—I don't know what he did with it.

Q. Do you know whereabouts he packed it in the tunnel?

A. I don't know how far he packed it—he took it maybe ten feet back to clear for himself, so he could work there.

Q. What kind of timber was that, do you know?

A. 3x12 plank.

Q. Native timber? A. No, sir.

Q. Fir timber? A. Fir timber.

Q. Had the earth been cleared away out of the tunnel from the former cave-in?

A. Up to just about the second bent, I believe, from the end.

Q. Could you reach the point where you were working from the end of the tunnel toward Chitina?

A. Yes, sir.

Q. Was there any difficulty in reaching your work from that end?

A. Well, I never went through there only once.

Q. Where were you staying? [94—59]

A. Staying at the Katalla Company's camp.

Q. That was on this end of the tunnel, was it?

(Testimony of Karl Johnson.)

A. Toward Chitina.

Q. The Chitina end? A. Yes, sir.

Q. Then in order to reach that tunnel by means of the other end you would have to walk around about a quarter of a mile, wouldn't you?

A. Just about that, I guess.

Q. While if you had gone in from this end it would only be a couple of hundred yards, would it not?

A. Something like that, I believe.

Q. Why didn't you go in from this end when you went to work?

A. Because it was too dark to walk through.

Q. And the dirt was on the track, was it not?

A. Yes, sir.

Q. The trains couldn't run through the tunnel, could they? A. No.

Q. Do you remember about when the first accident happened?

A. You mean the cave-in before that?

Q. The accident that happened at this end of the tunnel before Reeder was hurt.

A. No, I don't remember that.

Q. It was before you went there?

A. I was working up at the upper end, up towards Kennecott, at the time.

Q. It had happened at the time you went there?

A. Yes, it happened before I went to work there.

Q. And the tunnel was not being used for the operation of trains through it, then, during that time?

A. No, sir. [95—60]

Q. They couldn't run trains through, could they?

(Testimony of Karl Johnson.)

A. No, sir.

Q. How did the trains connect or get from Chitina to Kennecott Mines?

A. They used the switchback.

Q. Instead of going through the tunnel then they would go around the switchback over the hill, through which this tunnel was constructed?

A. Yes, sir.

Q. You are not working for the Railroad Co. at the present time? A. No, sir.

Q. Did I understand you to say that you were injured in there? A. I was a little bit; yes.

Q. But you helped to get the men out?

A. Yes, sir.

Q. Worked there about how long?

A. 15 or 20 minutes.

Q. Then where did you go? A. I went out.

Q. And where did you go after you went out?

A. Went to the camp.

Q. What camp? A. The Katalla's Co. camp.

Q. What did you do in the camp?

A. I went home to get other clothes on, being as I was all dirty and full of mud.

Q. Did you change your clothes? A. Yes, sir.

Q. Then where did you go?

A. Went over to that hospital they had there.

[96—61]

Q. And how long did you remain in the hospital?

A. For a couple of days I guess,—three days, I think.

(By Mr. COBB.)

Q. I believe you said you helped nailed this brace

(Testimony of Karl Johnson.)

on. A. Yes, sir.

Q. How long before the cave-in was that?

A. That must have been about a week, I think.

Q. And at that time people could get about in there underneath this place where it fell?

A. Yes, sir.

Q. There was plenty of opportunity to strengthen it up so it would hold, so the work could be completed? A. I think there was, yes.

Q. (By Mr. BORYER.) It did hold, did it not?

A. Yes, sir.

Witness excused. [97—62]

[Testimony of Chris Likits, for Plaintiff.]

CHRIS LIKITS, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. Chris Likits.

Q. Where do you reside?

A. Well, I have been living the last fourteen months in the Kennecott.

Q. How long have you been in Alaska?

A. About nine years.

Q. Were you living here in the year 1911?

A. In Chitina.

Q. What was your occupation at that time?

A. Carpenter.

Q. Whom were you working for?

A. I don't know. I was working for Mr. Heney and the Copper River & Northern Railroad and the Katalla Company.

(Testimony of Chris Likits.)

Q. What were you doing?

A. Worked on the bridge and some other matters.

Q. In the month of August where were you working? A. I was working in the Chitina tunnel.

Q. For the same people?

A. I don't know what company it was.

Q. It was on the Copper River & Northwestern Railway Co.'s lines and works, was it?

A. Yes, sir.

(Recess for ten minutes.)

Reconvened at 3:35.

Q. I believe at the time of adjournment you stated that in the month of August, the early part of that month, you were [98—63] working in the tunnel out there? A. Yes, sir.

Q. What were you doing?

A. We were reinforcing the tunnel, putting in some new timbers.

Q. Why was that necessary?

A. Why, the old timbers were too weak.

Q. You mean by that—

Mr. BORYER.—We object to that—I haven't any objection to his stating what he means by it.

By the COURT.—The witness can explain what he means by his answer if he wishes to or can explain to the jury in what way they were too weak.

Q. What do you mean when you say they were too weak? Explain fully.

A. I don't know exactly—I have to use my own judgment and opinion about it.

Q. That is what I want you to tell.

(Testimony of Chris Likits.)

A. The timbers were too weak; they were all round timbers, native timbers, this soft spruce and they were put in ten or twelve feet between—

Q. Is that the way those timbers were, as you describe them—the way the tunnel was timbered when it was originally constructed?

A. No, the original timbers were round timbers.

Q. Were these timbers you speak of as being too weak, were those the timbers that were used when the tunnel was originally constructed?

A. Yes, sir.

Q. And was used for train service? [99—64]

A. Yes, sir.

Q. Now, do you recall the circumstances of an accident happening there about the 7th of August, 1911? A. The tunnel caved in.

Q. Where were you at the time it caved in?

A. I was right under in the cave.

Q. What time of the day was it?

A. Well, I couldn't say exactly what time it was, but it was a little after 7 o'clock, I think.

Q. How long had you been at work?

A. That morning?

Q. Yes.

A. We went to work at half-past 6—we worked eleven hours a day. We went to work at half-past 6 and I had been working about 45 minutes, I think, or maybe an hour.

Q. Do you know the plaintiff, Dan Reeder?

A. Yes, sir.

Q. Did you see him that morning?

(Testimony of Chris Likits.)

A. No, I didn't see him but I heard him talking.

Q. When was your attention first called to him?

A. Well, before the cave-in,—just a little before the cave-in.

Q. How long before?

A. I couldn't say how long before,—ten minutes or so.

Q. A very short time? A. Yes, sir.

Q. What was it that called your attention to him?

A. I heard his voice.

Q. Did you see the cave-in? A. Yes, sir.

Q. Now, I want you to tell the jury this—how that cave-in occurred [100—65] and what caused it, and I will *ask* you Plaintiff's Exhibit "A" for identification and ask you if that represents correctly the way the timbering was put in that tunnel originally.

A. No, sir; that is the way the timbers were put in, the old timbers, the original timbers, and when I heard it, something cracked and I looked up to the roof and see this cap and this here coming down.

Q. Now, referring to Plaintiff's Exhibit "A," and calling your attention to the roof there of that timbering, I will ask you to state to the jury whether or not there was anything to hold that timbering up except the pressure on the arch.

A. Well, yes, there was the pressure—it was all full of dirt on top here; it was all piled up just as high as it would stand up, and of course here was caved in.

Q. Now, do you know what made that concern fall?

(Testimony of Chris Likits.)

A. Well, my opinion is, that the pressure of this roof and dirt on top here, while it was caved out on the sides, forced that cap through past this siding—forced this joint out and the cap came through.

Q. (By Juror.) There was nothing here to prevent it? A. No.

Q. When they started the new construction to remedy the defects of this original construction, I will ask you what was done, and call your attention to Plaintiff's Exhibit "B."

A. Well, you see the difference in them joints; that is stout enough if the weight was equal, equal pressure all around, but if it is not it forces through the joints, pass the points and goes by.

Q. Now, suppose all the weight was on top, that wouldn't force [101—66] that segment?

A. If all the dirt was on top here it wouldn't force through.

Q. That was the construction that was adopted with reference to the new timbers that were going in? A. Yes, sir.

Mr. COBB.—I will ask to have these admitted in evidence and marked Plaintiff's Exhibits "A" and "B." They are admitted and so marked.

Q. What sort of timbers was it that was in this tunnel as originally constructed—what character of wood?

A. They were native wood, spruce, round timbers.

Q. What sort of timbers were put in there at the time the accident happened?

A. Twelve by twelve fir.

(Testimony of Chris Likits.)

Q. There was a cave-in of these timbers ahead of the place where the cave came on the 7th, as I understand? A. Yes.

Q. It had given way ahead? A. Yes.

Q. You heard the testimony of the witness who preceded you on the stand on his cross-examination in regard to a brace? A. Yes.

Q. Did you take that brace out? A. No, sir.

Q. Did you see it taken out? A. Yes.

Q. Who was it taken out by?

A. John Sutton.

Q. Did that brace have anything to do with the cave-in that Reeder was hurt in? [102—67]

A. I don't think so.

Q. Explain to the jury why you don't think so.

A. Because the timbers lay over the wall-plate, coming up from the cap on the segments in an angle, from the upper corner down to the wall-plate. The cave-in started on the opposite side where the joints were. The joints passed one another like that. The brace was back here on that side; the cave-in was on the opposite side.

Q. That brace had nothing to do with sustaining the roof?

A. No, the brace was strengthening the sides, the segments.

Q. Just simply to stiffen the sides?

A. Yes, sir.

Q. Were you caught in the cave-in?

A. Yes, sir.

Q. How far from where Reeder was?

A. Just on the opposite side.

(Testimony of Chris Likits.)

Q. Did you see him?

A. No, I couldn't see him—it was dark.

Q. Did you hear him? A. Yes.

Q. What did you hear?

A. I heard him holler for help.

Q. What time was it that this cave-in occurred—did you say about a quarter past 7, along there?

A. Yes, after 7 o'clock.

Q. What time did they get you out?

A. About 11.

Q. Do you know whether they got Reeder out by that time or not?

A. No, Reeder got out after me; I was in the hospital when Reeder was brought in. [103—68]

Q. Do you know about what time it was they brought Reeder into the hospital?

A. I guess somewheres around noon—I couldn't say exactly when it was.

Q. You have been working for this company quite awhile? A. Yes, sir.

Q. Do you know anything about them giving tags to indicate who the men are working for, brass tags, some marked K. Co. and some C. Co.?

A. Yes, sir.

Q. How were you tagged on that occasion?

A. I had been working for Heney in 1911, all that winter, and I came to town after Heney finished up. We came into Cordova and the bridge superintendent, O'Brien, 'phoned into town to McFarland to come out on the next train and fetch out 7 or 8 men with him and start to work on the Chitina span, and the next morning we went back again and when we

(Testimony of Chris Likits.)

got down to the camp, the timekeeper gave us a check marked K. on it, but after a while, about a week or so, maybe longer, they changed it and gave us octagon tags marked C. on it.

Q. How were you tagged on the day of this accident, the 7th of August?

A. Well, I think we had the two of them at the time; we kept the two of them,—they told us to keep them until we got paid off.

Q. If those men were working, as a matter of fact, were working for and being paid by the Katalla Company, who was the Katalla Company working for?

Mr. BORYER.—I object to that.

Q. If you know what was the Katalla Company's men doing—if you [104—69] were the Katalla Company's men?

A. I don't know.

Q. Whose property were they working on, if you know? What were they working on, what property?

A. The Katalla Company's property, I guess.

Q. What road were they working on?

A. On the Copper River & Northwestern Road.

Q. At the time that you were working with the two checks that month, were you paid with two pay checks? A. Well, I don't remember that.

Q. Don't you recall the checks you were paid with, what bank checks—who signed them?

A. Why, they were signed by Mr. Davis, I guess, the paymaster.

Q. The paymaster for what?

(Testimony of Chris Likits.)

Mr. BORYER.—If he knows.

A. I don't know whether it was the Katalla Company or the Copper River & Northwestern Railway Co.

Q. You don't know which one it was?

A. No, sir, I can't say.

Q. If you say it was the Katalla Company, the Katalla Company was at work on the Copper River & Northwestern Railway? A. Yes, sir.

Mr. COBB.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. (By Juror PEDERSEN.) Will you please inform the jury what, if any, lights were in the tunnel at the time you saw the timber give way?

A. Yes, we had two carbon lights in there, but we were working with a lantern. There was a reflector on this carbon [105—70] light but this reflector was punched during the cave and we were working toward the back of it and we could see all in the roof plainly, but we were in the shade—back of the reflector it was dark; two carbide lights were in there.

Q. For whom are you working now, at the present time?

A. Well, the last I worked was at Kennecott, the Kennecott Mining Co.

Q. I hand you a brass check Nnumber 2318, marked K. C., and ask you if that is not the kind of a brass check that you had, with the exception of the number?

A. I don't know—we had one something similar to

(Testimony of Chris Likits.)

that and another one with C. marked on it.

Q. You did have a brass check, then, similar to that with K. C. marked on it, the same as this brass check has marked on it?

A. I fancy the K. was marked with a bigger, wider letter than this and I don't remember the company on it at all.

Q. Don't you know that was on it?

A. I don't know but that one I am referring to, it has a bigger letter—the K. marked on it.

Q. Don't you know that is the only brass check of that kind that was used on the road?

A. I don't know.

Q. You are not certain about that?

A. In fact, I worked for Heney and I don't remember.

Q. Heney's was larger?

A. Yes, Heney's was larger.

Q. And had on them, M. J. H.? A. Yes, sir.

Q. And this is the same Katalla Co. check that was used by all [106—71] the men?

A. I don't know, I couldn't say that, because I don't know whether they used that one, but I know there was one similar to that marked K. on it and one with C. on it, but I fancy the checks were bigger, the kind we had.

Q. But they were marked similar to that?

A. Yes, they were marked similar to that.

Q. I hand you a brass check marked No. 750 with C. on it and ask you if that is not the check you have reference to, having C. on it?

(Testimony of Chris Likits.)

A. I seen them checks; yes.

Q. Isn't that the kind of check that was given to you and that you have reference to in the evidence?

A. I don't remember if it was given to me or not, but I thought we had an octagon check the timekeeper gave us.

Q. You say one check had K. on and one check had C. on? A. Yes, sir.

Q. Do you know what that K. stood for?

A. No, sir—I guess Katalla Company.

Q. Do you know? A. No, sir, I don't know.

Q. If you do know I want you to tell me, and if you don't know I want you to tell me you don't know—don't you know that that stood for Katalla Company? A. I don't know.

Q. Don't you know that the C. stood for Construction? A. No, sir.

Q. Do you know what the C. did stand for?

A. No, sir.

Q. And now do you mean to say that you don't know that that C. [107—72] stood for construction? A. No, sir, I do not.

Q. And you don't know what the C. did stand for then? A. No.

Q. Now, did I understand you to say that these were not similar checks to the checks you had reference to in your direct examination?

A. I thought that one marked K. was a bigger check, a larger check, an all around larger check.

Q. But otherwise it was a similar check?

(Testimony of Chris Likits.)

A. Pretty near, yes.

Q. And the one with C. on, was that a similar check to the one you have reference to in your direct examination?

A. I don't think so. I think that one I had was an octagon check but I ain't sure—I don't know.

Q. It had a C. on it? A. It had a C. on it.

Q. But you don't know whether that was used to indicate the word Construction or not?

A. I don't know.

Q. Now, you say that you were working on a railroad that is laid between here and the Kennecott mines at the time? A. Yes, sir.

Q. I will ask you if you know of your own knowledge who owns and did own that railroad at the time of this accident? A. No, sir, I don't know.

Q. I will ask you if at the time this accident happened, if you were not working for the Katalla Company. A. I don't know.

Q. Then you don't know for whom you were working? [108—73] A. No, sir.

Q. Don't you know that you were drawing Katalla Company checks—checks signed by the Katalla Company? A. I don't remember.

Q. How long had you been working in this tunnel prior to the accident? A. About ten days.

Q. What were you doing in the tunnel?

A. Putting in timbers.

Q. What for? A. To reinforce the tunnel.

Q. Who was assisting you?

A. Well, I don't know what you mean.

(Testimony of Chris Likits.)

Q. Who was working with you?

A. John Sutton was my partner.

Q. And were you working there as a carpenter?

A. Yes, sir.

Q. Sutton was working as a carpenter, was he?

A. Yes, sir.

Q. And who else was working as a carpenter with you on this particular work? A. Dan Reeder.

Q. The plaintiff? A. Yes, sir.

Q. Who else?

A. Lockhart, I don't know his first name.

Q. And who else?

A. I don't know that gentleman's name that works with Dan Reeder, I forget his name—with Dan Reeder at the time.

Q. What was Mr. Reeder and the man working with him doing? [109—74]

A. They were getting ready to put in daps into the wall-plates to get some timbers in.

Q. And you had been working there about ten days? A. Yes, sir.

Q. And had Reeder been working there about the same length of time with you?

A. Yes, I guess when we started on the tunnel, when we came back from up the line, I don't know how long it was, but it was about ten days, I guess.

Q. At the time of the accident did someone remove a brace from the timbers of the tunnel?

A. Yes, before the accident.

Q. Who was that? A. John Sutton.

Q. Did you tell him to remove the brace?

(Testimony of Chris Likits.)

A. No, sir.

Q. Did you tell him not to remove the brace?

A. Yes, sir, I told him not to touch it.

Q. What else did you say to him?

A. I told him to leave the brace alone and, "You have to see the foreman first before you take it off." I thought there was quite a lot of weight on that brace, and of course the timbers were pretty shaky, and I told him not to touch that brace, leave it alone, but the brace was right in the way where the dap had to go, and I told him he had better see the boss and put in another one before we touched that one, but he said, "It will hold up anyhow," and he takes his claw-hammer, two feet long, and gets it between the brace and the wall-plate on the lower end and pries the brace loose. There was a space of about two inches between, and it was [110—75] spiked with two 60-penny nails on the lower end and couldn't hold more than an inch and a half in that native timber. He pries that end in and went on top and chopped off the edge of it, on the end; the top end was spiked by an 8x12 bull spike and from the nail, where the spike was, it split and ran up to an angle, about 4 ft. back, it cracked off, it was split. He just went up there and cut a sliver off and the brace fell down and we used that for staging; we had a staging up 8 ft. above the track, maybe more, so he could get at the wall-plate to cut a dap in.

Q. He didn't wait to take it up with the foreman then? A. No, sir.

Q. And are you certain you told him not to take

(Testimony of Chris Likits.)

that down, not to take that brace off? A. Yes, sir.

Q. Why didn't you want him to take that brace off?

A. Because I thought the timbers were pretty shaky and it was not used to hammering around there, and to leave it alone.

Q. How long after that brace was taken off was it before the cave-in occurred?

A. I don't know exactly—maybe about seven or eight or ten minutes, more or less, but it was a short time after.

Q. It may have been five minutes?

A. It may have been five minutes.

Q. Don't you think it was about five minutes?

A. I don't know for sure what time it was.

Q. It was somewhere between five and ten minutes, you would say? A. Yes, sir.

Q. Did I understand you to tell the jury that that is a correct representation of the framework in the tunnel, Plaintiff's [111—76] Exhibit "A," as it originally stood?

A. Well, it may not be exactly to the right bevel there, but the bevel is about that shape and that is the wall-plate; the timbers, they are from post to post; the joints were on top.

Q. I will ask you what you call the timber that connects with the upright post, from this tunnel, and connects with the top or cap of the tunnel?

A. That is the segment.

Q. Now, then, where was this brace that was knocked off attached to—to what was it attached?

(Testimony of Chris Likits.)

A. Well this brace was—now, suppose this is the first set from the cave, that is looking in from the Kennecott end of the tunnel; that is the first bent. The brace ran down from this point, ran on an angle down to the wall-plate, down here for four sets—for three sets. It started here to run down in this angle, down to the wall-plate, right over here. There is another set comes out here and another one out here and one out here and from this point out, that is the first one facing the cave-in, it runs down here down to the wall-plate.

Q. (By the COURT.) The braces would be about how long?

A. They were about 18 or 20 ft. timbers, 3 by 12's.

Q. I hand you a drawing and ask you if that represents the framework of that tunnel at the time of the cave-in. A. Yes, sir.

Q. Now, then, I will ask you to show the jury and tell them what that top timber is and point out the timber you mean as the top timber.

A. The cap? [112—77]

Q. Yes.

A. Well, that is the cap here; that is a cap there and that is the segment there.

Q. I will ask you what that timber is that crossed the tunnel and attached to the two segments.

A. That is by sawing the end here?

Q. No—wasn't there a timber across the tunnel?

A. Yes, sir.

Q. Isn't that the timber that reached across the tunnel?

(Testimony of Chris Likits.)

A. No, not up here—it is down here. There was a timber down here and a timber down there, but there was no timber up above there.

Q. Where is the cap?

A. That is the cap up here; that is retimbered and we had a staging up there to work on this wall-plate up here.

Q. Were you ever above the platform in the tunnel?

A. Well, I haven't been working for four or five days, and I came back that morning and went to work on the tunnel, put the plate down here. I came in here from the outside and started to work and the foreman told us to go ahead and get this dapping done in here, so we didn't have no time to look around, and I just saw this frame—he took it off. Sutton I told not to touch it, and when he took that off why about *about* ten minutes after there was a cave-in. Before the cave came in this corner it came down here first, this joint. When I see it—I heard it snap—and I hollered, “Look out,” and in a moment everything was gone, the lights disappeared and this was the point—this cap was pointing down like that when I see it first.

Q. And you don't remember this timber across here? [113—78] A. No, sir, I do not.

Q. Were you under or above the platform?

A. I was here—I was about three or four sets back from the cave.

Q. Three or four sets back from the cave?

(Testimony of Chris Likits.)

A. Yes.

Q. You had a platform across the tunnel?

A. Yes, sir.

Q. Were you working on top of that platform or underneath it? A. On top.

Q. And you were back about three or four bents from the place where you saw this start down?

A. Yes, sir.

Q. Back which way?

A. Towards the opening from the cave.

Q. Towards the opening you had gone in?

A. Yes, sir, towards the Kennecott end.

Q. Did the cave-in extend beyond these four bents?

A. No, I don't think so—it might; I don't know.

Q. Then you were standing at the time that the cave-in happened about four bents back from the Kennecott end, from the point where the tunnel started to cave in?

A. Yes, sir, about four bents.

Q. And where was Reeder standing?

A. He was about—I know he was on the opposite side, but I don't know whereabouts.

Q. None of the retimbered tunnel caved in, did it?

A. No, sir.

Q. And you only had four bents that you were re-timbering? A. Yes, sir. [114—79]

Q. Do I understand that you were standing on the outside of the timbers where it caved down?

A. On the outside?

(Testimony of Chris Likits.)

Q. Yes, by that I mean standing under the portion of the tunnel that had been retimbered?

A. No, if I was in there, if I stood outside I couldn't be caught, I don't think.

Q. If you were four bents back you would be standing on the outside, would you not?

A. Yes, I would.

Q. The general work that you were doing there was to make those four bents more secure?

A. Yes, sir.

Q. You didn't consider that the tunnel was properly framed, sufficient strength, and you were strengthening it up, putting in new timbers?

A. Yes, sir.

Q. What kind of timber were you using?

A. Twelve by twelve.

Q. Native timber or foreign timber?

A. Outside timber.

Q. How old are you? A. 35.

Q. How long have you worked in the carpenter business? A. About fifteen years, on and off.

Q. What do you mean by on and off?

A. I worked on the Alaska Central for about six months and then I haven't worked until I came to the Copper River & Northwestern here, and then I didn't work there more than [115—80] about eight months or so on it, that is, for Heney, and then I started for the Katalla Company.

Q. And you were working for the Katalla Co. at the time you were injured?

A. Yes—I don't know; it was for the Katalla

(Testimony of Chris Likits.)

Company or the Copper River & Northwestern Railway Co.

Q. You don't know which one? A. No, sir.

Q. Did you help to retimber that portion of the tunnel that was retimbered back of these four bents?

A. Yes, sir.

Q. Was Mr. Reeder working with you?

A. Yes, sir.

Q. What, if any, other steps did you take to brace the tunnel, with the exception of putting on this brace?

A. I don't remember. I know we put in some—about a week or so before we put in some temporary posts in the middle of the caps there; some caps were broke and we put in temporary posts in the middle of the caps.

Q. Where were those posts?

A. Somewhere in the middle of the tunnel, the middle of the timbers that were left.

Q. The middle of the tunnel? A. Yes, sir.

Q. More than one post under each bent?

A. No, one post in the middle of the cap, to support the cap.

Q. One post was extended from the base or bottom of the tunnel and extended up and put under the cap—is that correct? A. Yes, sir.

Q. What size of post was that?

A. I think they were 8x8. [116—81]

Q. Who put them in there?

A. Dan Lee and I was there and a few more, I guess—Reeder was there, Dan Reeder.

(Testimony of Chris Likits.)

Q. The whole carpenter crew put this in?

A. Yes, sir.

Q. What kind of timbers?

A. Eight by eight, I think.

Q. Native or foreign?

A. I don't remember now what they were, but I think they were fir.

Q. Then you had put a post extending from the bottom up under the cap on each one of those bents?

A. Yes.

Q. And you had put a brace across all four of these segments?

A. Yes, but them posts were way back to the tunnel, in the middle of the tunnel—they were not under those four segments.

Q. They were not under those four segments?

A. No, sir.

Q. How far back in the tunnel?

A. About the middle of the tunnel, what was left, that was from the cave to the portal, about the middle of it.

Q. Why did you put them in there?

A. One of the caps was broke in two.

Q. Why did you put it under the other three—why did you put the post under the other three spans—as I understood you to say, you put four in, one under each of the four spans?

A. No, them posts were put in,—that wasn't under the four sets, that cave-in—it was way back in the tunnel.

Q. You did put some in back, behind? [117—82]

A. Yes, further back.

(Testimony of Chris Likits.)

Q. *Why* you put in those posts there—that is what I am trying to get at.

A. To keep up the roof.

Q. Did it keep up the roof?

A. In that place, yes.

Q. And you put one under each span, did you?

A. Yes, I think one or maybe two. I don't remember well, but it is one or two, but I think it is one—put it right in the middle, I think it was.

Q. You had plenty of timbers there, did you not?

A. Oh, yes, quite sufficient there.

Q. How is that?

A. There was quite a lot around there, yes.

Q. Fir timbers? A. Yes, sir.

Q. They were convenient, close to you there—these other timbers were close?

A. Yes, they were close.

(By Mr. COBB.)

Q. Whose business was it to have those posts put in and placed securely?

A. That was, I guess, the engineer in charge, or the foreman, I don't know which, but I was told by the foreman to come out after supper and help put it in.

Q. The foreman or engineer in charge—do you know who the engineer in charge was?

A. Mr. Forrester, I guess.

Q. This gentleman here?

A. Yes, sir. [118—83]

Q. That place could have been secured in time, within the ten days preceding that, so it would have

(Testimony of Chris Likits.)

been absolutely safe could it not, with proper care?

A. I think so.

(By Mr. BORYER.)

Q. It was secured up to the time of the accident, was it not?

A. Yes, to a certain extent it was secured, yes.

Q. It hadn't fallen down prior to this brace being taken off, had it?

A. No, it didn't fall down before; no, sir.

Witness excused. [119—84]

[Testimony of John Reidy, for Plaintiff.]

JOHN REIDY, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. John Reidy.

Q. Where do you live? A. Cordova.

Q. How long have you lived here?

A. Six years.

Q. Were you living here during 1910 and 1911?

A. Yes, sir.

Q. What business were you in?

A. Mercantile business.

Q. Did you have any occasion to ship out over the Copper River & Northwestern line at that time?

Mr. BORYER.—We object to that as leading and suggestive. Objection overruled. Defendant allowed an exception.

A. Yes, sir.

Q. Is that the line up towards Chitina?

(Testimony of John Reidy.)

A. Yes, sir.

Q. I will ask you to examine a Bill of Lading that appears to be made out to you, made out to McDonald & Reidy—that is one of the bills of lading made out to your firm? A. Yes, sir.

Q. Did you do quite a good deal of shipping in 1910 and 1911? A. We did considerable.

Q. Is that a specimen of the sort of bills of lading you got?

A. Yes, sir.

Mr. COBB.—I offer this in evidence.

Mr. BORYER.—I object to it for the reason that it is a bill [120—85] of lading that purports to carry goods from Cordova to Miles Glacier, when this accident happened at Mile 131, some eighty miles beyond, a destination named in the bill of lading.

Mr. COBB.—It is over a portion of the same road.

Mr. BORYER.—I think not.

By the COURT.—If you connect it up it will be all right.

Q. These goods were over the Copper River Railway? A. Yes, sir.

By the COURT.—It may go for what it shows, showing that shipment to Miles Glacier.

Mr. BORYER.—The reason I made that statement—because this road has been under construction, there were portions of this road that was constructed and trains were run over that portion of it. There were other portions that were not constructed, that is, it was partially constructed, temporary tracks were laid down but there was no hauling over

(Testimony of John Reidy.)

the other portion of the road. There were licenses that were issued which is available to the plaintiff and issued for only a portion of the road and did not extend beyond certain points.

By the COURT.—The objection is overruled; as far as the admission of this particular offer is concerned, it may be admitted for the purpose indicated by the Court.

Defendant allowed an exception to the ruling of the Court.

Mr. COBB.—And one of the purposes is to show that the Katalla Company during the year 1911 was carrying on the business of common carrier by rail and was the Railroad Company.

Mr. BORYER.—I wish to make the further objection, for the reason that the bill of lading does not purport to be a [121—86] bill of lading of the date that the accident happened to the plaintiff.

By the COURT.—What is the date of it?

Mr. COBB.—May 4, 1911.

By the COURT.—Proceed—it may be admitted.

Defendant allowed an exception.

(The bill of lading is marked Plaintiff's Exhibit "C" and read to the jury by Mr. Cobb.)

Q. You say you received a great many bills of lading of which that is a specimen? A. Yes, sir.

Q. Did you receive that bill of lading also, for goods shipped? (Hands witness paper.)

A. Yes, sir.

Mr. COBB.—We offer that in evidence also in connection with the witness' testimony.

(Testimony of John Reidy.)

Mr. BORYER.—We object to it for the reason that the receipt or paper purports to be a paper with its destination at Miles Glacier, Mile 49, and for the further reason that it bears the date of May 8. What date is that, Mr. Reidy?

The WITNESS.—May 3d.

Mr. BORYER.—For the further reason that the bill of lading shows, or the paper, that it was issued on May 3, 1911, and is irrelevant and immaterial.

Objection overruled. Defendant allowed an exception. It is admitted as Plaintiff's Exhibit "D."

Mr. COBB.—That is all.

Cross-examination.

(By Mr. BORYER.)

Q. Now, these bills of lading or papers were for the purpose of [122—87] what? I will change that question: What person gave you the papers that have been just handed to you?

A. We got them down at the depot.

Q. What person gave it to you?

A. They were handed to us by the agent at the depot.

Q. Who was the agent?

A. His name is signed to it there.

Q. Do you recall who the agent was—was it Mr. O'Toole? A. O'Toole.

Q. The goods that you were shipping were being shipped from Cordova to what point?

A. We shipped to several points along the line.

Q. Take your bills of lading and answer.

A. Miles Glacier, this one.

(Testimony of John Reidy.)

Q. Is that the destination of both the bills of lading? A. Miles Glacier; yes.

Q. What are the dates of those papers or bills of lading? A. May 4, 1911, and May 3, 1910.

Q. May 3, 1910? A. Yes, sir.

Q. That is the time you shipped the goods that are enumerated on these papers marked Plaintiff's Exhibits "C" and "D"?

Mr. COBB.—One of them is 1910 and one is 1911?

Q. That is correct, is it? A. Yes, sir.

Witness excused. [123—88]

[Testimony of O. M. Kinney, for Plaintiff.]

O. M. KINNEY, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. O. M. Kinney.

Q. Where do you reside? A. Cordova.

Q. How long have you resided here?

A. About five years.

Q. What has been your business since you have been here? A. Grocer.

Q. Have you had occasion to ship goods out over the line of the Copper River & Northwestern Railway?

Mr. BORYER.—We object to the question as leading.

Objection overruled. Defendant allowed an exception.

A. I have.

Q. During 1910 and 1911? A. Yes, sir.

(Testimony of O. M. Kinney.)

Q. I hand you a bill of lading dated August 16, 1910, purporting to be dated Cordova, Alaska, and issued to O. M. Kinney and ask you if you ever saw that before? A. Yes, sir.

Q. Was that issued to you? A. Yes, sir.

Q. And the goods shipped out on the line of the road? A. Yes, sir.

Mr. COBB.—We offer that in evidence.

Mr. BORYER.—We object to it for the reason that it is not the proper way of showing that the defendant Katalla Company was a common carrier; for the further reason that the bill [124—89] of lading shows that it was issued on the 16th day of August, 1910, and for the further reason that the goods were consigned to a point this side of the point where the accident happened.

Objection overruled. Defendant allowed an exception. It is marked Plaintiff's Exhibit "E" and admitted in evidence.

Mr. COBB.—I am going to offer this one in evidence, of the same date.

Same objection; same ruling. Defendant allowed an exception. It is marked Plaintiff's Exhibit "F" and admitted in evidence.

Q. That was issued to you, was it, in the due course of business? A. Yes, sir.

Mr. BORYER.—I take it my exception goes to all this evidence.

By the COURT.—Yes, sir.

Q. I offer you some dated along in March, 1910, and ask you if that was issued to you?

(Testimony of O. M. Kinney.)

A. No, sir.

Q. Did you ship any goods out in 1911?

A. I think I did; yes.

Q. Did you get the same kind of bill of lading, from the Katalla Company, operating the Copper River & Northwestern Railway?

A. I don't remember now. I shipped from the time the road started. I couldn't tell you what kind of bill of lading I got.

Q. You have seen a great many of these Katalla Co. bills of lading issued here? A. Yes, sir.

Mr. COBB.—That is all. [125—90]

Cross-examination.

(By Mr. BORYER.)

Q. The dates and destination on those papers or bills of lading are the correct dates that they were issued and the places of destination?

A. I think so, yes, sir.

Q. To the best of your knowledge those are the dates? A. Yes, sir.

Q. And destination? A. Yes, sir.

Q. They were in 1910, I believe? A. Yes, sir.

Mr. BORYER.—That is all.

Witness excused. [126—91]

**[Testimony of Daniel S. Reeder, in His Own Behalf
(Recalled).]**

DANIEL S. REEDER, the plaintiff, recalled—
continuation of direct examination.

(By Mr. COBB.)

Q. How long had you been in there before the acci-

(Testimony of Daniel S. Reeder.)

dent, when you went over the hill to get your tools?

A. I don't think I was in there more than three or four minutes, if I was that long, because I just barely got in there, that is about all.

Q. What was the first thing that you heard indicating that there was an accident?

A. Why, I heard somebody sing out, "Look out," and I looked up and I see the cap coming down; it was nearly square over me, just a little bit back of me. I was kinder facing it, so I turned to run.

Q. And then what happened?

A. The whole roof came down and knocked the staging out from under me, and when I went down my fingers caught in the edge of the staging—if I hadn't caught on that staging, I would have been all right and not got hurt.

Q. Your fingers caught in the staging before it went down, the staging? A. Yes, sir.

Q. I understand you were up on the staging?

A. Yes, sir.

Q. Doing this work? A. Yes, sir.

Q. What made that cap come down, if you know, what caused the cap to come down?

A. What caused the cap to come down was, they were excavating ahead; the dirt was thawed—it is glacier muck and gravel mixed, and it ran down the sides, and as they kept digging [127—92] it out on the sides, it ran down until there was no dirt there under the segments at all and all the weight was on the cap, and it shoved the cap right down on the segment and the segment slipped down on the cap.

(Testimony of Daniel S. Reeder.)

Q. What effect did that have on the joint between the cap and the segments, when that muck ran out there? Explain that to the jury.

A. They excavated down at the bottom of these posts—it is bound to allow the dirt on the segment; this is an arch the same as you would put in masonry. It wasn't the way you put in timbers in a tunnel—this is the way you put in an arch for masonry, with an equal strain all around it. As soon as the strain was taken off of this leg, there was nothing to hold the cap on, the cap would slide right by and there was nothing to hold the cap; as soon as the strain was off, this dirt just ran outside the side, outside of the lagging and down on the track they were excavating out there.

Q. The new timbering that was being put in there to make the proper kind of a tunnel, does that indicate on Plaintiff's Exhibit "B" show the sort of timbering that should have been put in in the first instance, in order to make it safe—that is what they should have put in, what they were putting in then?

A. Yes, sir.

Q. How long had it been since you were in that particular place before?

A. I think it was something like four or five days, as near as I can remember.

Q. Now, at the time that you had been in there four or five [128—93] days before, was there anything to indicate that that was a particularly dangerous place to you? A. Nothing at that time.

(Testimony of Daniel S. Reeder.)

Q. Who told you to go to work there on this particular morning?

A. Dan Lee—that was our foreman.

Q. He was the man you took your orders from?

A. He got his orders from the engineer.

Q. He is the man you took your orders from under your employment? A. Yes, sir.

Q. Now, I want you to tell the jury, as well as you can, how you were caught, how long you were under there, and what damage was done to your person by this fall upon you—what part of you was hurt—that is, go ahead and tell them all about what happened as near as you can tell up to the time you were taken out.

A. I am going to say I was in there, as near as I can remember now of the time, I was in there four hours and a half. We were talking afterwards and as near as I remember I was in there four hours and a half. Now, in the construction, in order to hold this up, there was a lot of braces that were put from the ends of the ties—the railroad track was through the tunnel, to about halfway up the post, on each side, to hold the posts up, where we could put mudsills under. Those were generally put in at the railroad ties or posts into timber 6 or 7 inches in diameter, just temporary braces and slightly notched. Those old timbers were round and the contract was, the boys told me, and I guess it was true, to not be less than 8 inches at the small end, and if any [129—94] man has lived in the interior and knows what the timber is in there, you know there ain't very many of

(Testimony of Daniel S. Reeder.)

them much bigger than 8 inches; to cut a small notch in the post, about half-way up; the railroad track was through the middle here; they ran the brace down here on an angle like that, to hold these timbers up while we could put mudsills in under them, and when the staging I was on fell, I went down right among these braces and I fell on one of these planks the same as this brace they are talking about, that had been in there for staging—it was a 3x12 plank. It caught me just in the—just about there, just at the lower edge of my stomach, that would be about the edge of it. This whole leg—I was lying like that—was on top of the plank and the weight of the dirt on top of that. The rest of me was free. I couldn't touch the bottom with my hands and I couldn't with the other leg—I hung there on that leg all that time, that is, until they excavated out later on. The dirt then fell down so I could get down and get my shoulder on the dirt and I laid in there until I was excavated out, and during the time there was one of the fellows started to cut this brace out, and that is when they heard me hollering out at Shorty Kilson—I don't know his other name. This Italian that was down in there so long was down pretty near under me, and he was hollering at me that he was free, if they would cut the brace out, and he started to cut the brace out and if they had cut the brace out, the whole thing was bound to settle on me, and I tried to tell Kilson not to cut the brace out, and I used some pretty strong language but I got him to stop. I finally got another [130—95] one of the boys

(Testimony of Daniel S. Reeder.)

over there and told him not to cut that brace out—if he cut that brace out I was a goner—and he said to get some pieces of board, about three feet long, to put over my head, so as to keep the dirt out; my head was full of dirt for months after that, after I got out of the hospital I took dirt out of my ears. At any rate, I laid in there all that time until I was taken out. There was quite a while I was in there—I don't remember—I must have went to sleep, because I don't remember—I talked with Lew Smith awhile and then I knew of Tom Cloninger coming in there. The first I remember of him being in there was when he attempted—they had to lift my leg—they had to cut this board in two that my leg was on top of—they had to saw it in two underneath me, in order to pull me out. I come to just about that time and recognized Cloninger's voice, and that is the first I had recognized, I suppose, for a couple of hours, because I know that I was free then with my leg when I came to, but I don't know what did happen during the rest of the time.

Q. Now, I want you to tell the jury what damages were done to you, what injuries to your leg and what injuries you have sustained.

A. All I know about my leg is this—I have been told by good authority that my leg was examined when I was under the influence of chloroform in the hospital and found to be in pretty bad shape—

Mr. BORYER.—I object to that.

By the COURT.—State what you know.

A. This was from a man that was right there and

(Testimony of Daniel S. Reeder.)

saw the whole thing. [131—96]

Q. Was it from the physicians?

A. No, it was not from a physician. At any rate, they put my leg in a box that was on hinges, with a pulley under it, that comes right up to there, and strapped it in there for three months and a half. I don't think it was ever taken out of that more than once, if it was taken out then, and my foot was held perfectly straight. Now, if there was nothing the matter with my leg it is a question what they put it in a box for.

Q. Who did that? A. Doctor Smith.

Q. He was the company's doctor?

A. He was the company's doctor at that time.

Q. Any other part of you injured?

A. Yes, I was operated on right above the penis.

Q. For injuries to the pelvic bone?

A. My pelvic bone was broken. They had taken a picture of me, I think, on the 24th or 25th of August—I have the dates in my pocket here, if you will allow me to get them. I have them here somewheres. (Referring to book.) X-ray pictures were taken of me on the 24th and I was operated on the 25th day of August. Now, I laid there—I came down there on the 13th of August and laid there until the 24th before there was even a picture taken of me; they then took a picture of me.

Q. You mean an X-ray picture?

A. I mean an X-ray picture of me; yes. Under the X-ray picture they ciphered out, so they claimed, that my pelvis was broken, so I was put under the

(Testimony of Daniel S. Reeder.)

influence of ether and they operated on me. Well, it is always a question in my mind [132—97] why it was I laid there from the 13th to the 24th before I was operated on. Now, I must have been in bad shape because I weighed 210 pounds or 212, I think it was—just a day or two before—I was in the depot and weighed—when I got hurt and was working every day, but there is one time there that I don't believe I would have weighed over 125 pounds. They fed me on one glass of milk and a little tea for thirty-five days, so I must have been in pretty bad shape.

Q. That has happened more than eighteen months ago? A. Yes, sir.

Q. Is there anything in your experience during that time that indicates that the injury to the pelvic bone is permanent? If so, state to the jury what it is.

Mr. BORYER.—We object as leading.

By the COURT.—It is leading, but it is drawing his attention to something that probably could not be alleged in any other way—it might be done, perhaps.

Mr. COBB.—I will try to put it in another way.

Q. Is there anything in your general health or your experience in every-day life now, in the way of bodily suffering or otherwise, that indicates that the injury sustained by this pelvic bone is not yet over with?

A. Yes, sir.

Q. Tell the jury what that is.

A. Well, I haven't ate a beefsteak in a year—I can't eat any hard food at all. I have to eat some-

(Testimony of Daniel S. Reeder.)

thing that will go through my stomach and is very easily digested. When I was caught, I was caught right there (indicating), the lower [133—98] part of my stomach, and that is where all the trouble has been, with my stomach, since. I had to have the doctor, I think, about three times in the last year on account of it.

Q. Did you have any trouble of that kind before this accident?

A. No, sir; I could eat anything before that happened.

Q. Now, Mr. Reeder, how has your leg been up to the present time, since that accident, the use of it—how long before you could walk around at all?

A. I don't remember. I came out of the hospital on the 6th day of December.

Q. 1911?

A. Yes, sir. I went around on crutches quite a while and then used a cane for a long while. Of course I am able to travel now, I can walk pretty fair on the level, but when it comes to going up or down hill, my hip bothers me and my legs—any man can see the size of it; it is swelled. It is not so bad in the morning. If I want to put on my gum boots during the day I have to put them on in the morning, for the simple reason that I can't get my legs in them, into the gum boot, if I don't put them on in the morning, because it swells in the day and it seems I want a number 8 gum boot, the first gum boots I ever wore in my life bigger than a number 7, and I have the tops pulled off of them now trying to get my legs into

(Testimony of Daniel S. Reeder.)

them; and I am a little bit hard of hearing in one of my ears. We had two different doctors there that I notified I had dirt in my ears, and after I got in the hospital, about three or four weeks, I got a piece of log about the size of a pea, an ordinary pea, out of my left ear, that had worked out at that time.

[134—99]

Q. Has all of this trouble given you any suffering?

A. It certainly has. I have had Doctor Chase, I think, three different times in the last year on account of my stomach.

Q. On account of this bowel trouble you speak of?

A. Yes, sir.

Q. What were you earning at your trade at the time that this accident happened?

A. Well, I was getting 50 cts. an hour. Now, it is a question—I don't remember whether we were working eleven hours,—which I am pretty positive we were,—going to work at half-past 6 and working eleven hours a day. If it was, I was getting \$5.50, but I am not going to swear to it positively.

Q. The defendant paid you at the rate of \$150 for four months?

A. I believe they paid me at the rate of \$5 a day.

Q. For four months?

A. If a month had 31 days in it I got \$155.

Q. Five dollars a day for four months?

A. They paid me from the 7th day of August until the first day of December—they paid me the balance of August and September and October and November. Mr. Hawkins told me that he would pay my

(Testimony of Daniel S. Reeder.)

wages until such time as I was able to go to work at my trade again.

Q. And they paid it up to the first of December, 1911? A. Yes, sir.

Q. Have they ever paid you anything since?

A. No, sir.

Whereupon court adjourned until to-morrow (Friday), April 25, 1913, at 10 o'clock A. M. [135—100]

Friday April 25, 1913.

MORNING SESSION.

Continuation of the direct examination of the plaintiff—DANIEL S. REEDER.

(By Mr. COBB.)

Q. Since you got out of the hospital have you been able to work at your trade? A. No, sir.

Q. Have you been able to earn anything?

A. Why, I earn a little around town.

Q. What sort of work is it you can do?

A. I am doing janitor work—three different places here in town.

Q. About how much can you earn at that per month or a day?

A. For the three jobs I am getting \$35 a month.

Q. Is that about all the kind of work you are able to do?

A. Once in a while I get other light jobs I can do—I can make a little on the side.

Q. How long since you have been able to do that class of work—how long or for what length of time were you not able to do anything?

(Testimony of Daniel S. Reeder.)

A. I think I commenced doing janitor work along some time last June, if I remember right.

Q. Prior to that time were you able to do anything at all? A. No, sir, I was not.

Q. On Saturday—I think the jury understood it but I want it correctly—describing the conditions while you were lying there hung by your leg, you said you went to sleep. What did you mean by that—that you went off into a natural sleep or that you fainted?

A. I don't think I went off in a natural sleep—I don't remember anything, that is all. [136—101]

Q. You lost consciousness? A. Yes, sir.

Mr. COBB.—That will be all.

Cross-examination.

(By Mr. BORYER.)

Q. How long have you resided in and around Cordova?

A. I think I came here in February, 1908.

Q. Where did you live?

A. I lived for a while where the Arctic Lumber Company used to have their little shack there, beyond where the Red Dragon is now.

Q. When did you first begin working for the company?

A. I commenced for the Railroad Co. I commenced in August, 1910—I think it was August, somewhere about that time.

Q. In August, 1910—you began working for the Katalla Company at that time? A. Yes, sir.

Q. What did you do prior to that?

A. I worked around town here first and I had a

(Testimony of Daniel S. Reeder.)

contract here from the Townsite Co. clearing some of the streets, and then I was in on some grading jobs, grading lots in the town here, two different lots I was in on grading, and the balance of the time I put in working for the Arctic Lumber Co.

Q. You began working for the Katalla Company in 1910? What work were you doing for them?

Mr. COBB.—I object to that. He said he began working for the Railroad Co. and the counsel now says the Katalla Co. If he says it is the same thing, all right.

Q. From whom did you get your checks, by whom were they signed?

A. Which checks? [137—102]

Q. While you were working, doing the work that you say you were doing? A. In 1910?

Q. Yes.

A. I got them from—I think it was Robertson was paymaster for the company.

Q. By whom were they signed?

A. I don't know.

Q. Did you ever examine the checks?

A. Well, I didn't keep them long enough to examine them very much.

Q. By whom were they signed, at the time you were injured?

A. I don't know who they were signed by—I know it was from the paymaster I got them. I got them from the paymaster, that is all I know about it.

Q. You don't know by whom they were signed?

A. No, sir; I suppose Mr. Hawkins' name is on

(Testimony of Daniel S. Reeder.)

them but I don't know who else.

Q. Then you don't know by whom they were signed, that is, you don't recall?

A. I don't recall; no, sir.

Q. I believe your accident happened some time in August, 1911? A. Yes, sir.

Q. August 7, 1911?

A. Yes, sir. I have got two checks for August, 1911, one of them for \$37.50, I think, and the other for \$5.00 a day for the balance of the month, from the 7th day of August.

Q. I hand you a paper in the shape of a check, having thereon Check #394, number of check being #A114003, under date of [138—103] August 14, 1911, and ask you if that is the check that you received for your wages during the month of August, 1911.

A. That is the July pay check—this is the pay check for July.

Q. For what amount? A. \$114.80.

Q. By whom is that signed?

A. It is signed by Davis.

Q. Read the signature.

A. E. J. Davis, Cashier.

Q. What is above E. J. Davis' name?

A. I don't understand what you mean by what is above—the whole check is above Katalla Company—is that what you want to find out?

Q. Yes. A. That is on three or four places.

Q. Do you see on this check Copper River & Northwestern Railway Company anywhere?

(Testimony of Daniel S. Reeder.)

A. No, sir.

Q. I will ask you if you received that check for your wages during the month of July, 1911.

A. Yes, sir.

Q. I will ask you if you cashed that check and endorsed it?

A. My name is on it, I guess; I must have.

Q. Did you do it? A. Yes, sir.

Q. That is your signature on there, is it?

A. I think my wife signed that. I think I gave that to my wife. I think that is my wife's signature—that is her writing, not my own.

Q. But with your consent?

A. Yes, it certainly was. [139—104]

Mr. BORYER.—We offer that in evidence.

Mr. COBB.—I don't think I have any objection.

(It is admitted in evidence and marked Defendants' Exhibit 1.)

Mr. COBB.—I have no objection to all of those checks going in as one exhibit.

Mr. BORYER.—I want to question the plaintiff regarding the checks.

Mr. COBB.—My only purpose was to save time.

Q. I hand you check #A120076, under date of September 11, 1911, and ask you if you received that check for your wages during the month of—for work done by you during the month of August, 1911.

A. Yes, sir, that was the first—I should have had pay for seven days and I was a little short-changed on it—I should have had seven days' pay at \$5.50 a day but I was a little short-changed.

(Testimony of Daniel S. Reeder.)

Q. It is for \$35.50?

A. I was a little short-changed on the proposition.

Q. What do you mean by short-changed?

A. I should have had pay for seven days at \$5.50 a day.

Q. Instead of that you were paid for what?

A. I got \$35.50—it don't make any difference, it is gone now. I accepted the check and cashed it and it don't amount to anything.

Q. That check was for your pay up to the time you were injured? A. Yes, sir.

Q. And you were injured on the 7th?

A. Yes, sir.

Q. And you were getting how much a day?

A. \$5.50 a day. [140—105]

Q. How much would that make then?

A. \$37.50.

Q. And the check was for—\$35.50? A. Yes, sir.

Q. Now, you say you were a little short-changed?

A. Yes, sir.

Q. Did you take it up with the company?

A. No, sir.

Q. Did you say anything to the company about it?

A. No.

Q. Do you know whether the company knows that they short-changed you or not, if they did?

A. I do not.

Q. And you never said anything to them?

A. No, sir.

Q. Then you didn't say a word to them in regard to it? A. No, sir.

(Testimony of Daniel S. Reeder.)

Q. I will ask you by whom that check was signed?

A. It is signed by Mr. Davis.

Q. Whose signature is above Davis' name.

A. Printed or written?

Q. Printed.

A. The Katalla Company's name is on there.

Mr. BORYER.—I offer this in evidence.

(It is admitted and marked Defendants' Exhibit 2.)

Q. That was for the days you worked during the month of August?

A. That was before I got hurt; yes.

Q. I hand you a check #A103036 under date of July 11, 1911, for \$103.45 and ask you what that pay check was for. [141—106]

A. This is the June pay check—this I got when I was at Kuskolina bridge; this is for June.

Q. By whom is that signed?

A. Signed by Davis.

Q. Whose signature is above Davis'?

A. The same as the other check, Katalla Company.

Q. Davis signs it as cashier, does he not?

A. Yes, sir.

Q. And signs under the signature Katalla Company; is that correct? A. Yes, sir.

(The check is offered in evidence and admitted, without objection, and marked Defendants' Exhibit 3.)

Q. Now, then, during the month of July, 1911—your pay check for June was \$103.45, was it not?

A. It is on the check there, whatever it was. I be-

(Testimony of Daniel S. Reeder.)

lieve that is it, yes—that's the June check.

Q. Your pay check #A114003 under date of August was your time for July, was it not?

A. Yes, sir.

Q. \$114.80, was it not? A. Yes, sir.

Q. Was that about the usual amount that you drew down each month?

A. That depended on whether I was working steady or not—I got laid off them months.

Q. During June and July you drew down, in June \$103.45, and in July you drew down \$114.80, did you not? A. I lost part of each month.

Q. Now, then, I hand you draft #16604, dated October 11, 1911 [142—107] and designated as Defendants' Exhibit 4 and ask you what that is.

A. This is the pay for the balance of August, \$120. Mr. Hawkins agreed to pay the balance of my wages for the time—agreed to pay my wages for the balance of the time I was in the hospital and those are the wages he set himself—I said nothing to him about the wages at all,—he set those wages himself.

Q. Then the other check that I handed you for \$35.50 was for the time you worked in August, was it not? A. Yes, sir.

Q. This check for \$120 is time that was allowed you while you were in the hospital, was it not?

A. Yes, sir.

Q. So if you were short-changed a couple of dollars it was made up in this \$120, was it not?

A. No, sir.

Q. You still think you were short-changed—but

(Testimony of Daniel S. Reeder.)

they did give you \$120 for your time?

A. While I was in the hospital.

Q. From the date that you were injured until the end of that month of August? A. Yes, sir.

Q. And this is the draft that they gave you?

A. Yes, sir.

Q. I will ask you by whom that draft is signed?

A. It is signed by Mr. Hawkins up here, E. C. Hawkins and E. E. Spurgee.

Q. I ask you to examine the check at the usual place of signature for checks and ask you by whom it is signed at that place. [143—108]

A. E. J. Davis, Cashier.

Q. Whose signature is above that?

A. Katalla Company.

Q. You received that check, did you not?

A. Yes, sir—I think my name is on it.

Q. Now, then, I hand you draft #16676, under date of November 15, 1911, and ask you what that was for. (It is marked Defendants' Exhibit #5.)

A. This is the allowance for October. This is the second check I got, \$155. I got August; then I got October; then I got September and November. I got the October check my second check.

Q. Was that for time while you were in the hospital? A. Yes, sir.

Q. What is the amount of that check? A. \$155.

Q. And that was for what month?

A. The month of October.

Q. That was a month you were in the hospital?

A. One of them; yes.

(Testimony of Daniel S. Reeder.)

Q. I will ask you by whom that check was signed.

A. The same company.

Q. By the Katalla Company? A. Yes, sir.

Q. And by E. J. Davis, Cashier? A. Yes, sir.

Q. Then during the month of August, 1911, the company paid you \$35.50 and \$120, a total of \$155.50—is that correct? A. Yes, sir.

Q. You were in the company hospital during that month, were [144—109] you not?

A. I was there from the 7th of August, yes, sir.

Q. From and after your injury? A. Yes.

Q. They bore all of your expenses while in the hospital, did they not? A. Yes, sir.

Q. As a matter of fact, you paid the company \$1.50 a month for medical attention and board—I mean medical attention and hospital fees?

A. Yes, sir.

Q. And during the month of October you were paid at the same rate, were you not?

A. \$5 a day; yes.

Q. During the month of October? A. Yes, sir.

Q. During the month of November?

A. I was paid \$5 a day.

Q. When did you leave the hospital?

A. I left it on the 6th day of December.

Q. I will ask you if you were paid for your time in the hospital during November. A. Yes, sir.

Q. These checks were all signed by the Katalla Company, were they not?

A. Those I have examined now were, yes—I don't know what the others were.

(Testimony of Daniel S. Reeder.)

Q. Do you know that you received any checks that were signed by anybody else?

A. I don't know what September and November were; I wouldn't [145—110] swear to it. I presume they were the same as the others. I don't know that,—I wouldn't swear to that part of it.

Q. Now, then, I think you testified yesterday that you had had a conversation with Mr. Hawkins, wherein he had agreed to pay you during the time that you were in the hospital. A. Yes, sir.

Q. That was at the close of the testimony yesterday and I didn't catch it all—what was that you said?

A. I said Mr. Hawkins, when he was leaving, came into the hospital to bid us all goodbye, so I had a talk with him and I asked him how it would be about my receiving my pay after he left, and he said, "I fixed that all up, Reeder; you will have no trouble; you will get your pay until you are able to go to work again, and then we will put you to work." He said, "I have fixed that up and you need not worry about it."

Q. And what did you say to him?

A. I just thanked him for his kindness.

Q. Had you said anything to Mr. Hawkins about starting a suit?

A. No, sir, never thought of such a thing.

Q. You had assured Mr. Hawkins that you would not?

A. No, sir; such a thing never was mentioned about any suit—that was never mentioned between I and Hawkins.

Q. Was it ever mentioned to anyone?

(Testimony of Daniel S. Reeder.)

A. I think I mentioned it once to you, that if you had paid me as Hawkins agreed that we would never have had any trouble.

Q. Was that voluntary on your part or was it because I had said something to you?

A. We were talking about this Hook Jackson case—he had just [146—111] sued the company, I know, before that and I don't remember the conversation exactly; at any rate, I was over in your office and we were talking and I said as long as you paid me what Hawkins agreed to that I never would bother about any suit.

Q. You were paid up to the time that you left the hospital, were you not? A. No, sir.

Q. You left the hospital December 6th, did you not? A. Yes, sir.

Q. You were paid for the full month of November, were you not? A. Yes, sir.

Q. Then you were not paid for the six days in December you mean? A. No, sir.

Q. You were not paid for them? A. No.

Q. Did you ever ask any one for it?

A. Yes, sir.

Q. Whom did you ask?

A. I asked you—I asked Mr. Geiger, the superintendent, too.

Q. What did I tell you?

A. You said that you would fix it up the first time; the next time you told me that you were more interested in getting me a job watching than you were getting my check for me, and the next time you told me

(Testimony of Daniel S. Reeder.)

that you would try to raise me \$20—that was when I got that pass to go to Juneau.

Q. What was your object in going to Juneau?

A. I went up there to sell that cabin, and I wanted to see some other parties up there and take a look around.

Q. As a matter of fact, didn't you want a watchman's job there at Camp 1 and weren't we trying to arrange so as to get you [147—112] a watchman's job at Camp 1?

A. No, sir, I didn't want another job.

Q. You didn't want any job?

A. No, sir; not at that time; that was less than two months after I got out of the hospital and you objected to my leaving the hospital when I left it, and it was less than two months, only a month and a half after I came out on crutches—I don't think I would want a watchman's job at Camp 1.

Q. Why did I object to your leaving the hospital?

A. As near as I could find out you were afraid I would come over here and start a suit.

Q. You hadn't said anything about starting a suit?

A. No, sir.

Q. You had at all times stated that you were not going to start any suit and was telling me about another young man that was in the hospital that you thought was going to start a suit, were you not?

A. Not at that time—you never said anything to me about any suit. Any conversation you and I had was long after I left the hospital.

Q. Now, I will ask you if you ever said anything

(Testimony of Daniel S. Reeder.)

to me or ever said anything to any one of the company about starting suit in this action at all.

A. I never said anything to you; no.

Q. Never said anything to anybody else about starting suit, did you?

A. I don't know that I ever did, with any of the company officials.

Q. Never did? [148—113] A. No.

Q. Then you started this suit without ever taking it up with the company in any way, shape or form?

A. I took it up to try to get my pay and couldn't.

Q. Didn't you say anything to any one of the company about this starting this suit, or that you were dissatisfied?

A. I told you that I wanted to try to get my pay time and time again.

Q. And I was doing what I could to get your pay for you.

A. Your story and Mr. Geiger's didn't jibe there—Mr. Geiger told me plainly that any time that the legal department asked for my pay they could get it.

Q. Then those matters are turned over to the legal department, are they not?

A. Yes, sir—Mr. Geiger said it was all with the legal department.

Q. Now, then, did you ever notify me that you were dissatisfied and that you thought of starting suit against the company?

A. I don't know that I told you I was going to start any suit—a man when he makes from two to

(Testimony of Daniel S. Reeder.)

four trips to get a check I think he is pretty near dissatisfied.

Q. You never intimated that you were going to start or thought of starting suit, did you?

By the COURT.—I think that is sufficient. He has answered that.

Q. Now, then, after beginning work for the company in 1910, how long did you work for the company?

A. I commenced, I think, somewhere about the 16th of August—I am not positive of the date but I know the date we finished up. [149—114]

Q. August, 1910, you mean?

A. Yes—we ran up to—that is, we laid the boat up at Miles Glacier on the first day of November. The last trip we crossed Miles Glacier was about nigh on to the last day of October.

Q. And you worked for the company from that time up to the time you were injured?

A. No, sir.

Q. Off and on?

A. I went to work in the following May.

Q. Practically all the work you did from the time you began working for the company up to the time of your injury was for the company, was it not?

A. I worked here at carpenter work all that winter of 1910 and the spring of 1911.

Q. Carpenter work? A. Around town here.

Q. For whom were you working?

A. I helped when they put the third-story on the Rainier Grand Hotel. I helped when they put the

(Testimony of Daniel S. Reeder.)

second story on the Merchants' Cafe down here, Slater's building, and I was working on that, in fact, when Captain Hill came in here, and I hired out to go as pilot on one of the boats in the summer of 1911. I was working at Slater's building at that time.

Q. As ordinary helper or carpenter work?

A. I was carpenter's helper.

Q. How long did you work at that?

A. I don't know, I don't remember anything about that. I went to work there and worked until it was about completed, and then Captain Hill came in and I got a job and I quit that [150—115] then.

Q. What wages were you receiving at the time you were working for the company as a carpenter?

A. The Railroad Company, you mean, or the Katalla Company, or which ever company it is?

Q. Yes.

A. I received 45 cents an hour the greater portion of the time; the only time I ever received 50 cents an hour was in the Chitina tunnel—that was just before I got hurt, when I was working under McFarland.

Q. You received 45 cents an hour at all times prior to working in the tunnel? A. Yes, sir.

Q. That is the regular carpenter wages on the outside? A. I don't know that part of it.

Q. You received the same wages as the other carpenters on the outside?

A. I was receiving the same wages as the men that I was working with there, and that was the reason I got raised to 50 cts. an hour—Mac's gang came and

(Testimony of Daniel S. Reeder.)

they were all getting 50 cts. an hour, and I went to Mac and told him I had been working for 45 cts. and I was working with his men, and he said it was nothing more than right I should get the same wages as the rest of his men were getting.

Q. Did you think you were as competent as the other men?

A. I certainly was—I was doing the same work.

Q. And then when you joined the tunnel gang, you were allowed five cents an hour extra?

A. That is when I joined McFarland's gang. I had worked in that tunnel before and I only got 45 cts. before. [151—116]

Q. But McFarland's gang was getting 50 cts. a hour? A. Yes, sir.

Q. The other carpenters were getting 45 cts. an hour? A. Yes, sir.

Q. That were working on the outside?

A. No, there was other men working inside of it when I worked there before.

Q. How about the time you were working there this time?

A. I was working up to the time that Mac came there. I was getting 45 cts., but when we went to work for McFarland, I got 50 cts.

Q. Were there any other carpenters there getting 45 cts. an hour? A. Yes.

Q. Working in the tunnel?

A. Men working with me, Billy Wilds.

Q. Why were you allowed 50 cts. and he allowed only 45?

(Testimony of Daniel S. Reeder.)

A. He got raised the same time I did. I made the kick and we both got a raise at the same time.

Q. You felt that you were entitled to the raise?

A. I thought that I was entitled to the same wages as the rest of the men.

Q. Just as good a mechanic as the others?

A. There might have been some men there better mechanics than I was, but I think I was doing the work just as good as the greater portion of them there.

Q. When did you begin your first work on this tunnel?

A. The first work on that tunnel I think commenced in April.

Q. That is, you did your first work?

A. Yes, I think it was April. [152—117]

Q. What time in April?

A. I couldn't tell you that, anything about that, and it might have been May, I wouldn't say, but it seems to me it was April, because we started in early in order to do the work we wanted to do, have it done before the thaw come, while it was still froze.

Q. Some time in April or May, 1911?

A. Yes.

Q. What work did you start in to do?

A. I and Lew Smith was doing the frame-work.

Q. The framing of what?

A. The framing of the timbers at the bents that were to go in—we were putting in timbers, retimbering.

Q. Only two of you working there?

(Testimony of Daniel S. Reeder.)

A. There was only two of us framing at that time.

Q. Were you working in the tunnel or out of the tunnel?

A. We were in the tunnel part of the time; we were out where we were framing part of the time—we had to go in and get out our patterns, that is our measurements.

Q. What do you mean by framing?

A. Getting your timbers the length you want them to go into the tunnel—whatever length you want the cap and segment and your post.

Q. Then you were making the timbers that were to be used in the tunnel? A. Yes.

Q. Where would you make these timbers?

A. I think we framed all of ours on the Chitina end of the tunnel, right out just this end of the open cut—right along side of the engine house,—that was in the spring. [153—118]

Q. That is the Chitina end of the tunnel?

A. Yes, sir.

Q. You say in the spring you did this?

A. Yes, sir.

Q. What time in the spring?

A. Whenever we went to work there, along in April or May, and we work there until sometime in June.

Q. That is the time you have reference to?

A. Yes.

Q. How long were you working there framing these timbers, making these frames?

A. I worked there until we finished up that job

(Testimony of Daniel S. Reeder.)

in there,—I don't know, I think it was some time in June, about the first of June, if I remember right, I went to Kuskolina Bridge—after we got through there we went to the Kuskolina Bridge.

Q. In framing these timbers or making these timbers what did it necessitate you doing, in order to make these frames?

A. Well, the engineer started in to give us the cuts and lengths short and we spoiled three or four thousand feet of 12x12 timbers, and the engineer at that time concluded it was better for us to go and take the patterns ourselves, so we went in and every time we made a set of timbers—the tunnel had settled and there was no two sets of timbers alike and you had to take a templet and go in there and get the difference, every one was different, and get your measurements all separate and go out and frame a set of timbers according to your measurements and that was what we were doing—every time we cut a set of timbers we had to go in and get the measurements for the next one. [154—119]

Q. Then you were putting in bents or timbers—for what purpose?

A. To reinforce the tunnel.

Q. What do you mean, to reinforce?

A. Make it stronger.

Q. Then you didn't follow the instructions of the engineer as to the measurements, etc.?

A. The engineer, after he gave us four different figures on Number 8 bents, and there wasn't one of them that came within six inches of fitting, told us

(Testimony of Daniel S. Reeder.)

it was cheaper for us to go and get the measurements than it was for him to make the mistakes and for us to find that out afterwards.

Q. What engineer was that?

A. That was Mr. Price.

Q. Then you went in there and measured this tunnel for the purpose of getting the right length of bents and daps and caps and segments for the reinforcement of this tunnel? A. Yes, sir.

Q. Now, what portion of the tunnel were you reinforcing?

A. I think that we reinforced, I think, twelve bents on the Kennecott or further end of the tunnel from here—I think there were twelve bents, if I remember right and we either put in 6 or 8 bents on the Chitina end of the tunnel. They were afraid of the ends of the tunnel coming down. The first talk was, Mr. Price said that they figured on retimbering it clear through and then they concluded they would not do that, they would put in 12 or 16 bents on each end—so we got twelve bents in on the further end, that is the Kennecott end. We started in on—first I think we put in something like twelve bents—they are there yet to show if [155—120] they haven't been torn out since I got hurt; and then we came to the Chitina end and we had six bents; O'Neill had excavated under four bents on each side when the orders come that we wouldn't put in any more, that is, he had excavated out alongside of the mudsill, he hadn't got the mudsills out.

Q. After you had framed these bents and made

(Testimony of Daniel S. Reeder.)

the bents, did you help to put them in?

A. Yes, sir.

Q. Who was with you, if anyone, besides this one man that you spoke of, in helping to make these bents?

A. Well, the foreman was there part of the time, Hugo Fells, and toward the last old man Elliott was around there and he was generally doing the marking.

Q. Then the three of you made those bents?

A. Well, sometimes there were three, sometimes there was only two and sometimes there was four of us; it depended on how the work happened to come; there might be four of us out there or five or there might be only two and sometimes it might be all hands were in the tunnel—we only had a small crew in the tunnel and it took all hands as a rule when we went to raise.

Q. That was the beginning of the reinforcing of that tunnel? A. Yes, sir.

Q. In April, 1911? A. Yes.

Q. And you began to reinforce the tunnel from the Kennecott end towards Chitina,—is that correct?

A. Yes, sir.

Q. And you had reinforced that tunnel from the Kennecott end [156—121] up to within four bents of where there had been a former cave-in?

A. No, sir, there had been no cave-in in the spring at all—there was no cave-in. The first cave-in came in there sometime about the tenth day of July, tenth or fifteenth, just before I went to work. I got laid

(Testimony of Daniel S. Reeder.)

off on the Kuskelina bridge, I think, the 6th or 7th of July, and I was down home and walked through that tunnel when I came home—there had been no cave-in up to that time, and I was over at the tunnel and saw it after it broke down first and it was some time before I went to work—I think it was the 16th day of July that I went to work.

Q. Then the first cave-in happened while you were working on the tunnel, did it?

A. No, sir; I was not working for the company when the first cave-in happened.

Q. It was just before you went to work in the tunnel? A. Yes, sir.

Q. And just before you began making this framework, doing this reinforcement work?

A. I didn't do any framing when I went to work the last time.

Q. I mean the first time.

A. There was no cave-in the first time.

Q. There had been no cave-in prior to your starting the work in April?

A. No, there was no cave-in then.

Q. Was there a cave-in between April and June?

A. No, sir.

Q. When was that first cave-in? [157—122]

A. I just told you a minute ago. I said it was some time, I thought, about the tenth day of June, July, I mean.

Q. About the tenth day of July?

A. Yes, sir, it was some time in July, but it was after the fourth day of July. I am positive of that

(Testimony of Daniel S. Reeder.)

because I was working at Kuskolina bridge on the 4th of July and got laid off about the 5th or 6th.

Q. Then after you left there in June, there was a cave-in at the Chitina end of the tunnel, was there?

A. Not in the tunnel.

Q. At the edge of the tunnel, was it?

A. There was no cave-in from the time I left there until I went to work in the tunnel, until some time about the 10th of July there was a cave-in in the tunnel.

Q. Where were you working on the tenth of July?

A. I was not working on the tenth of July, I said.

Q. Then there was a cave-in on or about the tenth day of July?

A. Yes, sir—that was the first cave-in in the tunnel—it was about the tenth day of July.

Q. Then where were you working at that time?

A. The tenth day of July?

Q. Yes, about that time?

A. I was not working at all.

Q. Where were you staying?

A. At home.

Q. Where was your home?

A. I had a cabin on the Government ground, Chitina Heights, they call them.

Q. You knew of the cave-in? [158—123]

A. Yes, I saw it about half an hour after it happened, or less,—happened to be coming from town and when I went by the end of the tunnel I could see it.

Q. Then you began work there the next time, when?

(Testimony of Daniel S. Reeder.)

A. I think about the 16th of July. I know it was right after this first cave-in, right after the first cave-in I went to work. I and Billy Wilds were working there on the further end of the tunnel, making flume-boxes.

Q. For what purpose?

A. They were going to put in a pump there and try to hydraulic this muck out, to sluice it out.

Q. That had fallen down in July? A. Yes, sir.

Q. Then what was your next employment?

A. I worked there until—

Q. How long did you continue at that work of making sluice-boxes?

A. I couldn't just recall the time. I know we worked there making sluice-boxes—I don't know whether it was Mr. Forrester came to us then or Mr. O'Neill and wanted us to go in and brace up the tunnel. He was afraid a lot more of it was going down and we went and was using 3x12, I think, it was plank and bracing up the posts, about 8 ft. high on each post, right across from one bent, from one side to the other, right straight across, and we were putting in plank, I think, to keep them from sagging over; in case of heavy strain the posts, on account of too heavy a weight settling on the top down on the post, was bringing them in in the middle—they were all starting to come in.

Q. Explain to the jury what you mean by coming in at the middle. [159—124] You mean they were giving in the middle?

A. Yes, sir. The heavy weight on the top of the

(Testimony of Daniel S. Reeder.)

tunnel here on these posts, they began to sag in at the middle here, give right in. This is a glacier muck and gravel and it will ravel, it works down here and forces the middle posts in and we were bracing it across, the same as that brace is across there, to keep them from coming in; we were bracing those planks so they wouldn't spring sideways in case of a heavy strain.

Q. Who was instructing you to do this work?

A. I think Mr. Forrester there; I am not positive. That was before McFarland came there.

Q. How is that?

A. I think Mr. Forrester instructed us to do that; I am not positive. I think it was before Mr. Mac and his timber gang came to the tunnel.

Q. What kind of posts were those?

A. Those were a native spruce lumber.

Q. And by giving you mean they were bending in the middle?

A. Bending and springing in the middle.

Q. On account of the weight that was pushing down on them? A. Yes, sir.

Q. Did you brace all of the timbers or posts that you saw there that needed attention?

A. We didn't get them all braced before there was another cave-in.

Q. But you were bracing them?

A. Yes, sir, we were bracing them and they caved in again.

Q. And it was during the progress of this bracing that the cave-in came,—before you got it completed?

[160—125]

(Testimony of Daniel S. Reeder.)

A. Yes, sir.

Q. Was the other workman with you a carpenter?

A. Billy Wilds was and the rest of them,—we had some of O'Neil's men that were working in the mucking gang, what was known as the mucking gang—he sent, I think, four men in to help us. Billy Wilds and I were the only two of the carpenter gang that was there then.

Q. And you had charge of doing that work?

A. Yes, I and Wilds together.

Q. Now, then, did you ever see the tunnel after your injury?

A. I have never been in that tunnel since I was packed out of it.

Q. And when you came out of the tunnel you were in an unconscious condition?

A. No, I had come to—I was conscious about the time they fetched me out of there.

Q. Did you pay any attention as to the timbers at the time? A. No, not a thing.

Q. And you haven't seen the tunnel since that time?

A. Not only at a distance. I have walked past, right there at this end of the open cut—that is the nearest I have been to the tunnel.

Q. Now, when you stated that the segments were attached to the cap in the manner in which you stated it was attached—as a matter of fact, you hadn't seen the manner in which those caps were fastened after you were injured, had you?

A. No, not after I was injured, no—I seen them

(Testimony of Daniel S. Reeder.)

before a good many times.

Q. Not so often, had you? [161—126]

A. I helped brace up these sets that were coming down before that—before we could get the new timbers in. Two sets were coming down exactly the way those were falling.

Q. You hadn't noticed them particularly, had you?

A. Hadn't? Well, a man would come pretty near, working under them.

Q. And are you certain now that you saw how they were put together? A. I certainly am.

Q. Have you examined them?

A. I certainly have. I helped take out, I think, two or three sets at the further end of that tunnel in the spring and had to take them out entirely and put in new timbers in the place of them, because they had reinforced it at the further end of the tunnel, so we had to take out either two or three sets in order to get our new timbers in.

Q. As a matter of fact, now, you didn't consider that that was a dangerous way to put those together, did you?

A. I didn't think it was much of a way to frame timbers for a tunnel; they had men there that had forty years' experience in railroad tunneling said they never saw a set of timbers framed like that in a railroad tunnel in their life.

Q. Did they tell you this?

A. Yes, sir; that is old man Elliott, if you want to know the gentleman.

Q. Did you agree with him?

(Testimony of Daniel S. Reeder.)

A. I didn't know much about it, but I didn't think that was a proper way to frame timbers for a tunnel.

Mr. COBB.—I want to withdraw this witness a moment and put Mrs. Reeder on the stand. [162—127]

[**Testimony of Mrs. Daniel S. Reeder, for Plaintiff.**]

Mrs. DANIEL S. REEDER, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. Mrs. Reeder.

Q. What relation are you to the plaintiff, Daniel S. Reeder? A. He is my husband.

Q. How long have you been married?

A. Well, I think about two years. We were married about the 18th day of May.

Q. 1911? A. Yes, sir.

Q. What was the condition of Mr. Reeder's health at that time.

A. He was in very good health at the time he was hurt in the tunnel.

Q. Now, I want you to tell the jury what time it was, about, when he was brought home to you from the hospital?

A. He was brought home to me on the 6th day of December.

Q. Now, I want you to tell the jury what was his condition at that time and what indications there have been of his suffering from that time on.

A. He never has been the same man since that

(Testimony of Mrs. Daniel S. Reeder.)

very day he went into the tunnel. When he went into the tunnel he was a perfectly healthy man, and ever since he came out of the tunnel he has suffered something fierce, and several times he had the doctor. The last time he was sick pretty near two days, and I had to go down and get somebody else to do his work.

Q. What was his complaint—what did he complain of? [163—128]

A. It seemed like when any heavy food passes through his bowels it pains him severe—right in through here is where it pains him, and the pain is so severe that the doctor had to inject morphine into him and give him a powder of some kind. I don't know what was in it, but I have an idea there was a little morphine in it to kill the pain.

Q. An opiate of some kind? A. Something.

Q. What has been the condition of this leg that was hurt in the tunnel?

A. The leg swells on him and lots of times he gets up during the night and walks the floor to get it to quit from cramping.

Q. Have you ever noticed any indication of swelling during the day?

A. Yes, both of his legs swell.

Q. What is the indication as to his ability to work—can he do any physical labor as before?

A. He can't do no hard work—if he does his legs pain him.

Mr. COBB.—That is all.

Mr. BORYER.—No cross-examination.

Witness excused.

At 11:10 recess for ten minutes.

11:20 reconvened.

Mr. COBB.—Mr. Reeder, take the stand. [164—129]

**[Testimony of Daniel S. Reeder, in His Own Behalf
(Recalled—Cross-examination).]**

Continuation of cross-examination of DANIEL S. REEDER, the plaintiff.

(By Mr. BORYER.)

Q. I hand you Defendant's Exhibit 6 for Identification and ask you if that is a true representation of the frame-work of the tunnel. A. No, sir.

Q. In what way does it differ?

A. Those segments were left down into the plate on the inside about an inch and a half as near as I can remember; there was a small dap, the size of the leg there—what we call a leg—they call it a segment; they were left down into this plate—this was an eight by eight plate and they were left down on the inside, on a slant like that, ran from an inch and a half out to nothing on the back side. The way the joints are put here is something similar to the way they were; they were cut in a good deal like that, that is about the way they were. Other than that I don't see anything different, anything out of the way much; that is the way the timbers were.

Q. Is it a true representation other than as you have described to the jury?

A. That is the timbers, the bents you mean?

(Testimony of Daniel S. Reeder.)

Q. Yes. A. Yes.

Q. I will ask you what is the cross-piece, the first cross-piece, running under the cap of the tunnel, as shown on that drawing?

A. This cross-piece, you mean?

Q. Yes.

A. That is a board or brace put across there. [165—130]

Q. Connecting with what timbers?

A. It was connecting the two segments, right straight across the two segments. There was a board spiked on there and this brace running clear past—I don't see how they get the board running past—the board should be cut off like that.

Q. What do you mean?

A. The board starts out here. This plank was put across there and was a 3x12 plank.

Q. Are you certain of that?

A. Well, I wouldn't be certain, no. I wasn't in there when that was put in, if I remember right, but that is the way I remember it—that is a 3x12 plank, spiked across there, to put the deck on there. They had a covering overhead—the rock and gravel kept sifting down and they had a covering up there so the men could work under it, but it was put right up within two feet—that shows in the middle; it was put up less than two feet from the top.

Q. And are you certain that the corners of it were cut off or not?

A. I don't understand how you can get it in there unless it was.

(Testimony of Daniel S. Reeder.)

Q. What size do you think that piece was?

A. 3x12, as near as I remember it.

Q. Three-inch thick?

A. Yes, and 12 inches wide, because that was the sized plank that was there, as near as I can remember—that was the only decking or planking we had there—it was all three inches.

Q. What kind of timber was that, what kind of wood? A. It was Douglass fir.

Q. Foreign timber? [166—131]

A. It was imported from the states; yes.

Q. Did you ever examine that timber?

A. Not particularly; no, sir.

Q. When you say it was 3x12, on what do you base that?

A. Well, we made about four or five hundred feet of fluming there and we had nothing else to make it out of but 3x12, and that is all the planking they had out there.

Q. And you made it out of 3x12? A. Yes, sir.

Q. This brace that would go across the segments?

A. I don't know anything about that; the braces we put in was 3x12, when we were reinforcing, strengthening it, there; yes, sir.

Q. Show the jury what braces you put in.

A. I didn't put any of these braces in here.

Q. Show the jury where you put the braces in.

A. When do you mean?

Q. The time you spoke of putting the brace in.

A. I believe I have answered that already once.

Q. I don't quite understand it.

(Testimony of Daniel S. Reeder.)

A. I described once to the jury that that brace crosses the middle of these posts to keep the centre of it from coming in.

Q. And what other braces did you put in?

A. The only other braces I remember of, there was four caps in one place breaking down and two in another and they were coming down. Supposing this is the tunnel looking toward the Kennecott; they were coming down at this side, right in here. You could—it was open enough so you could bend your wire and shove it up half an inch, way into the joint [167—132] and they were beginning to crack, so we set posts from the railroad track down here on the outside end of the ties. We wanted to keep the track clear so we could run a push car through and we set posts from the outer end of the ties up to right in underneath the end of the cap, to hold it from coming down. That is one place—we had two posts like that of 8x8 fir timber. In another place we noticed the caps were beginning to break, to crack in the middle—the weight was too heavy for the middle of them. We wanted to keep the track open, that was one of the objects—we put braces in from the mudsills here right up through to the centre on each side. We went out in the woods and cut round timbers, round poles, and put one on each that way. It took two posts for each and every bent; we cut them square at the end and had them fast so they would be together, two of them in the middle of the cap; that was to hold them up until such time as we could get the new timbers in. We put in, I think,

(Testimony of Daniel S. Reeder.)

four sets of these braces—one night there we worked until midnight, there was quite a crowd of us; we had to go and get them and lay them on the push-car and bring them in—we had a car there we used to bring them in.

Q. Will you draw a line through that showing the manner in which you put those posts in?

A. That is the way the posts went in, we caught them on the mudsills and they went up and caught right in the middle of the cap, one on each side—that was to hold the middle of these caps up. These caps were coming down in the middle, on a circle like that—some of them were sprung down four or five inches. Timber will spring considerable before [168—133] it starts to break but these were sprung and were starting to break—I think we had four sets, if I remember right.

Q. The line you have drawn from the base of the upright post leading to the segment on the right-hand side of this drawing is the line before indicated, the post that you put in on that side, is it?

A. Yes, sir.

Q. And corresponding on the other side is the line to indicate the other post that you put in, is it?

A. Yes, sir.

Q. About how much do you say that that cap had swayed or bent?

A. Some of them, as near as I can remember, had sprung down some four or five inches, I wouldn't swear positive, but I know that you have got to put from two to three inches spring in that timber before

(Testimony of Daniel S. Reeder.)

they will start to break, and they were all starting to break.

Q. You mean all of the four bents that had not been reinforced?

A. No, sir; they were four bents way out, some distance from it—I don't remember—but they wanted to save it, keep it from caving in, because when it started in one place they couldn't tell how far it would run, breaking and caving in; we were timbering, but we hadn't got up to them at the time.

Mr. BORYER.—I desire to offer this in evidence as Defendant's Exhibit #6.

Mr. COBB.—He has not testified to all of this. I object to that going in until there is some testimony about it.

Q. I will ask you to look at this same exhibit, the drawing, showing this upright post, with a brace extending across, and ask you if that is a true representation of the brace [169—134] that was put on?

A. No, sir.

Q. In what way does it differ?

A. You have five bents there in front of the new timbers when there wasn't but four.

Q. Then the drawing represents one extra timber?

A. Yes, one extra set of bents there.

Q. Otherwise, is it a true representation?

A. I told you before, that brace proposition, I don't remember much about it. I didn't help put the brace on, and I don't remember but very little about it. I don't know whether the brace was put on when I was in there or not.

(Testimony of Daniel S. Reeder.)

Q. Did you see the brace?

A. I wouldn't swear positively I have seen it, but I kinder think I did.

Q. Do you recall if that is the manner in which the brace was put on?

A. It is, to a certain extent; you have got one set of timbers too many in there, for the brace to be put on the way it was put in there.

Q. Outside of that, does it represent it as you remember it?

A. Well, it is, comparatively speaking, yes, as near as I can remember—I don't remember much about it, because the brace was taken off before I got in there, and all I remember about it was, the one on the side that the cave came in—that was all I remember about. I don't remember about the brace that was standing at all. All I do remember was the brace on the opposite side, the side the cave came on, that is all I do remember about. After we were working in there, we went out—there was no deck in there to work on [170—135] when we quit working there, when we went over to the depot. We had just put these timbers across that; they put this deck on later on and they put that in—Mac's gang with the other lot of carpenters put that in, after we went over to the depot, and for that reason I don't know just what these men, all of them, did in there after I left there. I can only tell you about what I seen for the short time I was in there, but they had made quite a change in the four or five days we were over at the depot, from the time I left there until such

(Testimony of Daniel S. Reeder.)

time as I came back. There was no deck in there for them to work on when I left there, because we worked up there with a raising car, and we put in some heavy timbers, if I remember right, 8x8, across which they put a deck on afterwards; we put them in, but that is all we done. There might have been a few plank thrown on there, but I don't remember of this deck in there—that they were running wheelbarrows. There was no such thing as wheelbarrows up on that at all when I was there.

Q. Did you have a loading platform in the tunnel at the time?

A. No, sir; not that I remember of—I don't remember just how the thing was fixed in there.

Q. You were taking some dirt out of there?

A. They were taking out a lot up to the time that we came with the raising car. We couldn't take out dirt when we had the raising car in there, because we were running the raising car, as anyone has got to do, to put in the new timbers. What they were doing with the McFarland gang at that time, I don't remember, but they couldn't be taking out dirt. The raising car was an ordinary flat car—they couldn't be taking out dirt when we were raising. [171—136]

Q. You did have a platform in there?

A. We had put these heavy timbers across, but as far as a platform—I don't remember that we built any platform while I was in there. McFarland's gang done that after we went to the depot.

Q. I will ask you if that is a correct drawing

(Testimony of Daniel S. Reeder.)

of the platform that was in there, the loading platform?

A. That I don't know—that proposition was made after I came out of there.

Q. You don't know about that?

A. I don't remember that platform; no, sir.

Mr. BORYER.—Now, I desire to offer this in evidence.

By the COURT.—It may be admitted for the purpose of illustrating the testimony of the witness.

Mr. COBB.—We have no objection to it for that purpose.

Q. Now, I want to find out just which one of these segments that you saw give way, and the location of the segment as to the place in the tunnel? That is my object, and if you will bear that in mind—

A. Which segment?

Q. I understand in your testimony you stated that you saw one of the segments that was connected with the cap give way and start to fall, and that is the first that you saw of the tunnel caving in—do you recall that?

Mr. COBB.—We object to that—counsel is mistaken.

The WITNESS.—I said I saw the cap come down—I never said nothing about the segment. I said I saw the caps coming, and I ran, and I didn't stop to look very long, believe me.

Q. Now, I just want to get the location of that cap, where it was with reference to the tunnel?

[172—137]

(Testimony of Daniel S. Reeder.)

A. I don't know which one of the middle four—there was four bents left there, but I rather think that I know that it was one of the middle four, and I think it was one next to the face, not the one next to the new timbers. I think it was the middle one next to the face. There would be four timbers. That drawing you have got there of five timbers is a dream, that fifth timber.

Q. I will try to ask you a few questions just to locate it—say that you were facing Chitina, with your back toward the end of the tunnel that goes to Kennecott. I understand that there were four bents across this tunnel that you were working on, is that correct? A. That hadn't been reinforced.

Q. There would be four bents—there would be a post on each side of the tunnel going up, then?

A. Yes, sir.

Q. And those posts were about four feet apart, as I understand? A. Yes.

Q. And now, assuming that you were facing—or what position were you standing in when you saw this cap?

A. I was pretty near under it; I don't remember; as near as I can remember, I was towards the new timbers.

Q. Let us find out—toward which end of the tunnel?

A. I was a little bit nearer the Kennecott end of the tunnel than the centre of these timbers that fell. I was under them, but I don't recollect exactly where I stood or how I was standing.

(Testimony of Daniel S. Reeder.)

Q. Were you facing Chitina?

A. I don't know that.

Q. You can't say at this time whether you were facing the Chitina [173—138] or the Kennecott end of the tunnel?

A. No, I wouldn't say positively, but I think I was facing this end, as near as I can remember.

Q. Facing towards Chitina? A. Yes, sir.

Q. Now, let us assume that you were facing towards Chitina, with your back toward the Kennecott end of the tunnel—now, then, on which side of the tunnel did you see this cap?

A. On the left-hand side?

Q. On the left-hand side? A. Yes, sir.

Q. Facing Chitina?

A. Yes, the left-hand end of the cap.

Q. Under which one of the bents?

A. One of the two middle bents, I don't know which.

Q. Then, do you recall where you were standing in reference to those two middle bents?

A. I was pretty near under them.

Q. What attracted your attention?

A. Why, the dirt rattling down from above; the dirt began to move and you could hear it rattling.

Q. And you looked up and you saw that this cap had started to move? A. Yes, sir.

Q. And then you started to run? A. Yes, sir.

Q. Now, then, you are certain—if you are not certain, I want to get this as certain as you can make it—to the best of your memory, do you feel certain that

(Testimony of Daniel S. Reeder.)

it was one of the caps on one of the middle bents?

A. Yes, sir. [174—139]

Q. And that it was on the left-hand side?

A. Yes, sir.

Q. What were you doing at that time?

A. I wasn't doing anything.

Q. What had you been doing?

A. I just come in from outside—I went after my tools and just came through the tunnel where it was broke down.

Q. You hadn't started to work?

A. No, sir; I hadn't started to work at that time.

Q. Did you have any tools with you?

A. Yes, sir. I just paid my tools down and just stepped back when this thing started to rattle.

Q. I understand, then, that you had just walked up to this point? A. Yes.

Q. Put your tools down, and you heard a noise and you looked up and saw this cap moving?

A. Yes, sir.

Q. And then you ran out, or started to run out and was caught? A. Yes, sir.

Q. The earth fell behind you, then, did it, so as to cut you off from going out towards the Kennecott end?

A. No, sir; I was caught on the Kennecott side of it. I ran towards Kennecott.

Q. And the earth fell that way, did it?

A. It would fall behind me.

Q. It fell behind you, so as to catch you going out of the tunnel?

(Testimony of Daniel S. Reeder.)

A. I went down in there—I got right in among the braces—I was on the Kennecott side of the cave-in. I was just about underneath the first set of new timbers, as near as I can remember. [175—140]

Q. What tools, carpenter tools, did you have with you—were they carpenter tools? A. Yes, sir.

Q. What were you going to do?

A. I was going to dap out there so we could put in 12x12's in those plates that were in there; we had to cut a 12-inch dap in every one of those plates in order to put in new posts.

Q. What do you call the plates?

A. They ran straight through on top of the posts on the old timbers.

Q. How much dapping did you do?

A. We had to cut in a notch—some of them we had to cut clear in two; others we didn't have to cut any more than two-thirds way through—it depended on how much the post had given down below. We generally set the new timbers in on a kind of a line—if the old timbers had sprung considerable below the lagging it would be no use, you couldn't get the top of your post out where it should have been—and we would make a kind of average—

(By the COURT.)

Q. The work you were doing was—

A. Just at the foot of the legs or segments.

Q. Then you started to work to make a place for the brace or post to go under the point that fell?

A. Yes, sir.

By the COURT.—I didn't understand it that way.

(Testimony of Daniel S. Reeder.)

The WITNESS.—That was to drop in at the top of the posts—the top of the post came to the top of this old plate, which we were doing or dapping in the roof or on the side, on the [176—141] side right at the turn.

Q. Then you were going to put in a post under those caps,—is that correct, as a support for those new caps?

A. I was going to put in new timbers there.

Q. What kind of new timbers were you going to put in? A. 12x12.

Q. Were you going to take out any timbers?

A. We didn't have to, just cut a notch in there.

Q. And then you were putting in extra timbers?

A. Yes, sir.

Q. And leaving the old timbers? A. Yes, sir.

Q. Why were you putting in those extra timbers?

A. The old timbers were too weak to stand the pressure.

Q. And you were trying to strengthen them?

A. Yes, sir.

Q. Do you know where Likits was working at that time? A. I know what he told me.

Q. Did you see him that morning when you went in?

A. Well, I wouldn't swear positively whether I saw him or not—I think I must have seen him, because I went over on the opposite side, and I must have seen him on the side they were on. John was my partner and we were on the other side, we were working on the opposite side, and I must have seen

(Testimony of Daniel S. Reeder.)

him because we were going to work on the opposite side.

Q. Then Likits and Sutton were working on the right-hand side of the tunnel, on the corresponding bent that you and your partner were working on on the left-hand side?

A. We were not working at all—I and my partner were not working, neither one of us had got to work.
[177—142]

Q. But that is where your work was going to be?

A. Yes, sir.

Q. You say you went over on the opposite side and talked to the workman that was working on the other side?

A. I don't think I said a word to John at all.

Q. Did you see him there?

A. Yes, I had—he was standing on the next link of plank from what I was on.

Q. You saw him there, then? A. Yes, sir.

Q. Did you see Sutton there?

A. I don't remember—I must have seen him because Sutton and Likits were together—I must have seen him; I don't remember that part of it.

Q. And at the time you saw this cap give, where was Mr. Likits and Mr. Sutton?

A. I presume they were on the other side of the tunnel.

Q. What was the distance across that tunnel?

A. I don't remember whether it was 15 ft. or 17 ft., I have forgotten—it was an odd foot, I know—it was either 17 ft. 3 inches on an average or it was 15

(Testimony of Daniel S. Reeder.)

ft. 3 inches, about three inches—I have forgotten. As near as I can remember we had to cut about 8 inches off of a 16 ft. plank between the timbers.

Q. Where was your partner standing?

A. He was on the next link of plank, the ones I tried to get on to to get out of there—he was on them plank when it went down.

Q. Did you see him standing there?

A. No—well, I must have seen him. I don't remember anything [178—143] about it.

Q. How long had you been standing there before you went to work?

A. A couple of minutes maybe, two or three minutes maybe.

Q. Would you say it was as much as five minutes?

A. Possibly was. I don't hardly think it was, though—it would take you about five minutes before you can see anything when you come in from outside with this light, and you have to stand around a certain length of time before you can see anything to work—any man that has gone in with lights underground knows that to be a fact—you have to be in a few minutes before you see anything.

Q. Is that the reason you were standing around?

A. It certainly was.

Q. Because you couldn't see?

A. No man can see when you first come in—every man that has worked underground knows that as a matter of fact; that is the reason that I can't call exactly how the things were in there, because I was not there long enough, as the saying is, to get your

(Testimony of Daniel S. Reeder.)

eyesight under ground.

Q. How do you enter that tunnel?

A. I went in from the Chitina end, through the breakdown.

Q. Was that obstructed?

A. Yes, I had to go in over the breakdown, over where it was broke down; about 180 or 90 feet was broken down.

Q. Then you were in the open? A. Yes.

Q. Over that 180 or 90 ft.? A. Yes, sir.

Q. And that extended clear to the point where you were going [179—144] to work, did it not?

A. Yes, sir.

Q. There was an opening there so that the light could come into the tunnel at that point?

A. Where do you mean?

Q. Just after you got over this 180 or 90 ft. of the breakdown?

A. There couldn't much light come into the tunnel, 400 ft. long—in the middle.

Q. How far were you working from that end of the breakdown?

A. The Kennecott end of the breakdown?

Q. Yes, the Kennecott end of the breakdown?

A. We were working right at the Kennecott end of it, end of the breakdown—that was somewhere not far from the middle of the tunnel.

Q. The idea that I am trying to get at is, that you were working right next to the breakdown, were you not—right next to the end of the breakdown?

A. Yes, sir.

(Testimony of Daniel S. Reeder.)

Q. Then what obstructed the light from entering the tunnel there?

A. The light from outside? There was about 200 ft. of a crooked tunnel for it to come through—that tunnel is on a curve.

Q. We will say that these outside lines are the lines of the tunnel—

A. Yes, but you should have made them on a horseshoe, crooked, because there is quite a crook in that tunnel.

Q. Now, we will say that this is the Chitina end?

A. Yes, sir.

Q. Now, then, the breakdown, as I understand it, commenced at that [180—145] end and extends back here, about how many feet?

A. No, it didn't commence at the end—the timbers we put in there in the spring were still standing there, 6 or 8 bents from the end of that tunnel, were still standing at that time. The cave-in was over either 6 or 8 bents from the end, back 180 ft. from this end, further through, on back.

Q. It was 6 or 8 bents from that end, back about how many feet.

A. I think it was 180 ft., if I remember right—I think it was 45 bents.

Q. Then we will say that carries it to this line?

A. Yes.

Q. Now, in reference to this line that I have indicated here with my pencil, marked A, where were you working?

A. We were working, going to work, along the

(Testimony of Daniel S. Reeder.)

first set of timbers, four timbers behind that—toward the Kennecott end.

Q. That would be them 16 ft. from the letter A, would it not?

A. No, four sets of bents was not 16 ft. when I was a carpenter.

Q. What was the distance between the bents?

A. It takes five sets of bents to make 16 ft.

Q. Then it would be less than 16 ft.?

A. Yes, it was 12 ft.

Q. It was about 12 ft. from the letter A?

A. Yes, sir.

Q. And we will say that that 12 ft. is represented by the letter B. A. Yes, sir.

Q. All of the earth and top of the tunnel from 'A' up to within the point where you said it started to break down, was lying down in the cave, was it not?

A. Yes, sir. [181—146]

Q. So that the earth and timbers that had fallen was down below the roof of the tunnel at A, was it not?

A. About level with the roof as near as I can remember.

Q. How did you get in?

A. There was a hole at this end, you could go right by—the old timbers kept sliding down all the time, but there was a hole that you could get through and go underneath the cap and get out and come through the open cut.

Q. Did you crawl through this hole?

A. Yes, on my hands and knees—and got against

(Testimony of Daniel S. Reeder.)

the wall, followed along the wall going through. I have worked underground in Fairbanks and the Dawson country until I know how to go through an underground cut, because I have mined considerable, and all you have got to do is to keep along the walls and you can go through without getting your head cracked.

Q. Did the light penetrate through this opening?

A. Very little. I couldn't see anything after I once got in; in fact, I couldn't see the walls. I had been in there before and helped them lay a pipe and I knew the lay of the ground and knew just how to go through.

Q. Could you see Likits and Sutton on the other side? A. I don't know whether I did or not.

Q. It was so dark you couldn't see them?

A. I could see them 180 ft. through the dark.

Q. I mean when you were standing there?

A. After I got in?

Q. Yes.

A. I believe I told you a while ago I was not certain I saw them. [182—147]

Q. Could you see them?

A. I presume maybe I could, after I got used to the light.

Q. It was so dark you couldn't distinguish them?

A. They had lights at the other end where the men were working—they had two carbide lights there as well as some small lanterns.

Q. It was about 17 ft. across the tunnel, I understand?

(Testimony of Daniel S. Reeder.)

A. I don't know whether it was 15 ft. 2 or 3 inches or whether it was 17 ft.

Q. Approximately that? A. Yes, sir.

Mr. BORYER.—That is all.

12 o'clock—recess, until 2.

AFTERNOON SESSION.

Redirect Examination of Mr. REEDER.

(By Mr. COBB.)

Q. Mr. Boryer this morning asked you in regard to some braces that you indicated to the jury there as having been placed by you and the men working with you, running from the timber in the side of the tunnel or mudsill up to the center of the cap at an angle, and another one at the same angle on the opposite side to it, to support the cap. When were those braces put in?

A. Well, they were put in some time along last part of July, I should judge, about the last of July or first of August—about the last of July; it was just when we were putting in the new timber—we put them in when we were timbering the tunnel, at that time.

Q. It was some time prior to this accident?

A. Yes, a week or ten days, I should judge.

[183—148]

Q. Where were they put in?

A. Where we put two posts under there was about, I should judge, 15 sets back of where the breakdown was.

Q. Where the accident happened you mean?

A. Yes, sir.

(Testimony of Daniel S. Reeder.)

Q. It wasn't at the same place where this accident happened?

A. No, it was back further, before we got up to that.

Q. I believe you stated that they were put in there to prevent a cave-in at that place by reason of the timbers being too weak? A. Yes, sir.

Q. Were there any such precautions as that taken at the place where the accident happened?

A. No, sir.

Q. During the four or five days that you had been in there could any of such precautions have been taken?

A. Yes, it could have been done at any time up to the time of the accident.

Q. If the roof of the tunnel where this cave-in happened had been secured by the braces such as had been used where you were at work in there before, could this accident have happened that morning that you were hurt there? A. No, sir.

Q. Who had charge of the work of—the entire work of the reconstruction of that tunnel?

A. Mr. Forrester.

Q. He was the superintendent in charge of it?

A. Yes, sir.

Q. Now, you were shown some checks here this morning countersigned [184—149] by E. C. Hawkins—Who was E. C. Hawkins?

A. Well, I believe, the way I understood, that he was vice-president and general manager of the Copper River & Northwestern Railway Co.

Q. And here is one countersigned E. C. Hawkins,

(Testimony of Daniel S. Reeder.)

per George Geiger—who was George Geiger?

A. He was the new superintendent of the Copper River & Northwestern Railway Co.

Q. Mr. Boryer spent quite a good deal of time this morning to show that on this part of the tunnel indicated in black here, which is intended to represent the cave-in, that there was light from the surface coming down because of the cave-in—I will ask you whether the cave-in extended clear through to the surface?

A. No, sir, no lights in there except what we put in there, artificial, either acetylene or coal oil.

Q. No light in there whatever? A. No, sir.

Mr. COBB.—That will be all.

(By Mr. BORYER.)

Q. Do I understand you that there were no braces on those bents?

A. There wasn't the last time I was in there, I don't remember of any. There was no brace, upright, under them to keep them from coming down.

Q. You mean that there was no brace standing up, perpendicular? A. No.

Q. Do you know whether there was any other brace there?

A. This brace, like the one on the opposite side, that one that [185—150] Likits and Sutton between them tore off.

Q. You are talking about the last four sets?

A. Yes, sir.

Q. How do you know three wasn't any braces there?

(Testimony of Daniel S. Reeder.)

A. I didn't see any when I walked in there and I could see the end of it. The acetylene lights were such so that you could see the last two or possibly three bents, but back of that it was hard to see anything because the reflectors were turned towards the boys.

Q. You don't know as to the other?

A. If there had been any posts in there I think I would have seen them because I was standing there close to the acetylene light,—in fact, I just spoke to O'Neill, just before I turned around.

Q. Then you remember that O'Neill was in there now?

A. Yes, sir—I remembered all the time that he was in there.

Q. I understood this morning that you didn't recall anyone?

A. O'Neill's name I don't remember has been mentioned in this case—I have never heard it—at least I never mentioned it.

Q. Now, you say that these checks were countersigned by E. C. Hawkins?

A. No, I didn't say anything about how they were signed.

Q. Countersigned?

A. The signing is all on there—I never paid any attention to that part of it.

Q. I understood Mr. Cobb to ask you a moment ago if those checks were not countersigned by E. C. Hawkins?

A. Mr. Hawkins's name is on them; that is all

(Testimony of Daniel S. Reeder.)

I know about it.

Mr. COBB.—I asked him who Mr. Hawkins was.
[186—151]

The WITNESS.—He asked me who Mr. Hawkins was, whose name was on the check.

Q. Who did you say Mr. Hawkins was?

A. He was known here as vice-president and general manager of the Copper River & Northwestern Railway Co.—that is the way he was commonly known.

Q. Wasn't he vice-president and general manager of the Katalla Company?

A. I never knew it was a corporation.

Q. And chief engineer of the Copper River & Northwestern Railway Company?

A. I never knew that the Katalla Company was a corporation.

Q. Do you know, Mr. Reeder, what position Mr. Hawkins held with the Katalla Company?

A. No, sir.

Q. Do you know what position he held with the Copper River & Northwestern Railway Co.?

A. Not only just what I have seen and the term he went by here.

Q. Did you ever see his name in connection, where he signed it as Vice-president and General Manager of the Copper River & Northwestern Railway Company?

A. I never saw him sign his name, I think, in my life. I don't remember that I ever seen him sign it.

Q. You don't know, then, what his position was?

(Testimony of Daniel S. Reeder.)

A. I stated it was general talk—I didn't say he was.

Q. You don't know?

A. I knew what was the common talk around the town here—what it was generally understood.

Q. As a matter of fact, don't you know that he was vice-president and general manager of the Kattalla Company and chief [187—152] engineer of the Copper River & Northwestern Railway Co.?

By the COURT.—He has answered that.

Q. This check that you say is countersigned by Mr. Geiger—did I so understand you?

A. I believe there is one of them there signed by George Geiger. I am not certain.

Q. Is that the one you have reference to as being signed by Mr. Hawkins, per Mr. Geiger? (Handing witness check.)

A. Hawkins name is on there—I don't know anything about it.

Q. Per George Geiger, is it not?

A. Yes, that is the way that it is signed.

Q. And over that is chief engineer, is it not?

A. Yes, sir.

Q. That is the check you had reference to that Mr. Geiger had signed?

A. I don't understand what you mean.

Mr. COBB.—That is the check I had in my hand when I asked you the question?

A. He asked me who Mr. Geiger was—that is all I heard.

Q. He signs that for Mr. Hawkins, does he not?

(Testimony of Daniel S. Reeder.)

A. Yes, that is the way he signs there.

Q. As countersigned by the engineer?

A. Yes, sir.

Q. That check is dated when?

A. The 15th of November, 1911.

Witness excused. [188—153]

[Testimony of William H. Chase, for Plaintiff.]

WILLIAM H. CHASE, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. William H. Chase.

Q. What is your age? A. 40.

Q. What is your profession?

A. Practicing medicine and surgery.

Q. What is your residence? A. Cordova.

Q. How long have you resided here?

A. A little over four years,—about four years in this town.

Q. How long have you been practicing medicine and surgery? A. About 17 or 18 years.

Q. Since you have resided in this vicinity have you ever held any position with the defendant companies in this case, or either of them? A. No, sir.

Q. Did you ever do any professional work for them, the Copper River & Northwestern Railway Co. or the Katalla Co.?

A. Why, not directly. I have in emergencies.

Q. In emergencies out along the railroad when called in? A. Yes, sir.

(Testimony of William H. Chase.)

Q. Do you know the plaintiff in this case, Dan Reeder? A. Yes, sir.

Q. How long have you known him?

A. I think about three years, possibly a little longer,—three or four years. [189—154]

Q. I will ask you if at the time of the accident at the tunnel out near Chitina, on or about the 7th day of August, 1911, you were called in in that *emergency* the defendant company. A. Yes, sir.

Q. Where were you at the time the accident happened?

A. I was at Strelna when I got the word—that is Mile 146.

Q. Were you out there on business for the railroad then?

A. No, I had been over to the Kotsina country and arrived there at Strelna about 8 o'clock in the morning—I had walked all night.

Q. Who did you get the word from?

A. I guess it was the station agent there. I have forgotten now—I couldn't say positively who it was.

Q. Railroad station agent?

A. Railroad station agent.

Q. That was on the line of the Copper River & Northwestern Railroad? A. Yes.

Q. Did you go up to this tunnel or the hospital near it?

A. I took a speeder and started for Chitina and when I was about halfway down I met an engine coming for me and then went to Chitina,—I didn't go to the tunnel at the time, because they said that

(Testimony of William H. Chase.)

some of the men had been taken over to the town of Chitina and it would necessitate an extra round-about walk if I should go to the tunnel, into the tunnel.

Q. You went to the railroad hospital at Chitina?

A. They had no regular hospital—I went to a couple of tents right near town, improvised, I suppose, into a hospital—I [190—155] don't know what they had been used for.

Q. Did you see the plaintiff that day, Reeder?

A. Yes, sir.

Q. What time as near as you can recall?

A. I wouldn't say positively; it was probably somewhere around 11 o'clock.

Q. Some time towards the middle of the day, at any rate? A. Yes, sir.

Q. Where did you see him?

A. Why, I first saw them bringing him on a stretcher—I couldn't recall whether it was a stretcher or a bed. I see some men coming down the track with some one and I was told at that time it was Dan Reeder; at this time I was in the tent, dressing some superficial wounds on other people caught in the tunnel.

Q. Did you make an examination of Mr. Reeder at that time?

A. I made a superficial examination.

Q. What did you find?

A. I found a swelling and discloration in the left groin, here (indicating), very sensitive to touch; the left leg I couldn't rotate or manipulate without ex-

(Testimony of William H. Chase.)

cruciating pain he described as in the lower region of the abdomen. If I remember correctly, the leg itself was not sensitive below the hip, but if you attempted to move it or make any amount of articulation, it would cause him pain.

Q. Now, tell the jury what that indicated to you as a physician and surgeon.

A. I made as good an examination as I could. I looked for crepitatus or grating to see if there were any bones broken, and I could get none at that time, but there was so much [191—156] swelling I thought possibly there might be some internal rupture of a vein or artery and I put him in as comfortable a position as I could—I had three men to look out for and I think I administered cold applications, so in case there was a rupture of a blood vessel, it would cause coagulation of blood and contract the blood vessels and lessen the hemorrhage, if there was a hemorrhage there. After I put him in as comfortable a position as possible and put on these applications, then I went to attending to the others.

Q. That is all you did for him that day?

A. I wouldn't say positively whether it was or not—I may possibly have given him a sedative, something to quiet him,—I wouldn't say.

Q. Do you know when he was taken down to the regular hospital of the company? A. No.

Q. Who were the regular physicians of the company at that time?

A. Doctor Smith, I believe, was in charge.

(Testimony of William H. Chase.)

Q. Did you see the plaintiff after that at any time?

A. Yes, I saw him some time after—I don't recall the date.

Q. Where was he then?

A. In the Katalla Company hospital.

Q. Can you tell about how long afterwards that was?

A. It was so long ago, I don't recollect—I generally keep a diary of those things and if I had the time I might refer to it for dates.

Q. Was it a week or month?

A. I imagine offhand that it was at least a month. I wouldn't [192—157] swear to that, I wouldn't say positively.

Q. It was quite a while at any rate.

A. Yes, sir.

Q. What condition was he in then?

A. I made no examination at that time—I was called in to give him an anesthetic for an operation.

Q. You assisted Doctor Smith in performing an operation? A. Yes,—I gave him the anesthetic.

Q. What sort of an operation was performed.

A. It was impossible for me to see just what they were doing.

Q. You know what they were doing?

A. From the general talk.

Q. Tell the jury what they were doing and what you did there.

A. From what I could learn in the talk I should imagine they were joining the fracture, if there was

(Testimony of William H. Chase.)

a fracture—I never saw this X-Ray picture, but I understood there was a fracture of the arch of the pelvis.

Q. That is the bone that supports the lower bowel?

A. Yes, sir; I understood it was fractured, and it was necessary to cut, make an incision and drill holes through this bone, and I wouldn't say whether they put a wire on to it to get a ligature to join the two edges together.

Q. You didn't observe the condition of his leg at that time? A. No, sir.

Q. Was it dressed in any way?

A. I wouldn't say positively—he was all covered up as they cover patients.

Q. Have you attended the plaintiff since in a professional capacity?

A. Yes, I have been called in. He is an Eagle and I am the [193—158] physician for the Fraternal Order of Eagles.

Q. What is his condition to-day as to health, as to his bowels—whether they are in proper condition or not or normal health?

A. That would be very hard to determine, almost impossible to say—I couldn't say as to that.

Q. You have attended him for bowel trouble?

A. Yes, I have been called in in emergencies.

Q. What was he suffering with when you were called in?

A. I remember distinctly once it was some internal disturbance; if I remember correctly, at that time, I attributed it to something he had eaten; there was

(Testimony of William H. Chase.)

a distention of the abdomen—distention with gas.

Q. Any connection between the suffering he had been undergoing and the injury to the pelvic bone?

A. I don't think so—I think it was an acute condition, possibly brought on by something he had eaten. We often get those cases.

Q. Was there any indication of a stricture of the lower bowels or anal passage by reason of this injury? A. Not that I ever discovered.

Q. Did you ever make any examination for it?

A. Not for the rectum; no, sir.

Q. Have you had any occasion to examine his legs?

A. I suppose I made a general superficial examination when I was called in and he was suffering from this acute pain.

Q. You did examine then carefully to see whether there was any connection or not between his injury that he received of the pelvic bone and this disturbance of the lower bowels? [194—159]

A. Perhaps the local pain may have been due to more or less constriction caused by the incision and then by distending the abdomen with gas, it may have brought the tension to that particular part of the tissues, causing a sensitiveness at that point.

Q. Did you ever give him anything for his leg?

A. I don't remember of ever giving him anything.

Q. To refresh your memory, I am going to ask you if about April, about a year ago now, you were not called upon when he was suffering with his legs?

A. It would be impossible for me to say that because I have been called so many times in different

(Testimony of William H. Chase.)

cases—I don't recall the particular instance.

Q. To refresh your memory a little further—on that occasion didn't you advise him never to take any drink that had alcohol in it, on account of his leg? A. I don't remember that; no, sir.

Q. Do you keep a diary of these things?

A. Yes, sir, I keep a dairy of calls. I don't keep a dairy—

Q. Not what you tell the patient? A. No.

Mr. COBB.—That is all.

Mr. BORYER.—No cross-examination.

Witness excused. [195—160]

[Testimony of H. C. Feldman, for Plaintiff.]

H. C. FELDMAN, a witness called and sworn in behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. What is your name? A. H. C. Feldman.

Q. What business are you in?

A. Hardware business.

Q. What is the name of your firm?

A. Northwestern Hardware Co.

Q. How long have you been in business here in Cordova? A. Four years.

Q. Did you have occasion during the year 1911 to ship any goods out over the line of the Copper River & Northwestern Railway.

A. Not under the Northwestern Hardware Co.'s firm name—the firm's name was Feldman & Gerber in 1911—the firm name changed.

(Testimony of H. C. Feldman.)

Q. I will ask you if you ever saw this before.
(Handing witness paper.) A. Yes, sir.

Q. Were these bills of lading issued for shipments on the Copper River & Northwestern Railroad?

A. Yes, sir.

Q. Examine both of them? A. Yes, sir.

Q. Freight paid on them? A. Yes, sir.

Mr. COBB.—We offer these in evidence.

By the COURT.—They will be admitted and appropriated marked.

Mr. BORYER.—We ask for an exception to the ruling. [196—161] Exception allowed. (They are marked Exhibits “G” and “H.”)

Mr. COBB.—That is all.

Mr. BORYER.—No cross-examination.

Witness excused.

Plaintiff rests.

[Proceedings Had on Motions for Nonsuit.]

Mr. BORYER.—I have a motion to make.

The jury being excused, Mr. Boryer filed separate motions for a nonsuit on behalf of each of the defendants.

After argument by counsel—

By the COURT.—In refusing this nonsuit, I would say that if Reeder had been working those last four days there—had been working along on day shift and had returned the following morning, with all the knowledge he has shown here, I would grant the nonsuit, but from the very fact that he was away those four days, whether there was a burden then on the

Railroad Company to have done certain work those four days, whether they did it or not, or how they did it, I believe are questions for the jury. I say that eliminating the Acts of 1906, 8 and 10.

The motion being filed separately for each defendant, the ruling is separate as to each motion and exception allowed each defendant. [197—162]

[Testimony of Chris Likits, for Defendants.]

CHRIS LIKITS, recalled as a witness in behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. BORYER.)

Q. I believe that you were called for the plaintiff in this case? A. Yes, sir.

Q. You testified here in this case before?

A. Yes, sir.

Q. Where were you working on the 7th day of August, 1911? A. In the Chitina tunnel.

Q. Where were you working on the 6th day of August, 1911? A. In the depot.

Q. On the 5th day of August, 1911?

A. I was working in the depot.

Q. On the 4th day of August, 1911?

A. Well, I don't know—I guess I worked four days in the depot—three or four days. I am not sure.

Q. What were you doing at the depot?

A. Putting up some shelves down there and doing some finishing work and changing tables and such work.

Q. Who was assisting you?

A. Dan Lee was the foreman.

(Testimony of Chris Likits.)

Q. Who else? A. I don't remember now.

Q. Was Reeder?

A. I think they were moving some building or something down there, doing some outside work, but I was working inside the building and they were working outside—I think they were. [198—163]

Q. Where had you been working just previously to going to work down at the station?

A. Working in the tunnel.

Q. Who was working with you in the tunnel, the last time you worked in the tunnel?

A. I think all the gang were there then.

Q. Was Reeder working with you?

A. Yes, I think so.

Q. Then you quit work, did you, all of you?

A. Some of us, if I remember right, some of us went to the depot, and I don't know what the rest were doing.

Q. The carpenters all left there, did they?

A. I believe they did.

Q. Reeder left? A. I believe he did.

Q. You left? A. Yes, sir.

Q. And the other carpenters left there?

A. Yes, I believe so.

Q. Then when did you go back to work in the tunnel?

A. About half-past 6 the 7th day of August, 1911.

Q. Who went back there to work with you?

A. Why, John Sutton.

Q. Who else?

A. I don't know the men's names down there;

(Testimony of Chris Likits.)

there was lots of men down below there excavating and moving dirt down below.

Q. Moving dirt? A. Yes, sir.

Q. What kind of dirt were they moving?

A. What came out of the cave, gravel and rocks and clay and [199—164] such stuff.

Q. Removing dirt from the hatch?

A. From the cave and wheeling it into the railroad cars and taking it outside of the tunnel.

Q. That is the cave-in that happened some time—

A. Before.

Q. In July? A. Yes, sir.

Q. What other carpenters, if any, were there with you that morning, besides yourself and John Sutton?

A. I don't know who they were, but I heard Dan Reeder's voice just before the cave-in.

Q. Who is Dan Reeder?

A. The gentleman sitting there.

Q. You heard Reeder's voice then?

A. Yes, sir.

Q. And then you three were the only carpenters that were in there working on those four bents?

A. Well, I don't know; there might be some more in there, but Dan Reeder, I heard his voice. I didn't see him, but just before the cave-in, I heard his voice.

Q. You had been working about how long?

A. About fifteen minutes or so, I guess.

Q. What work had you done during those fifteen minutes?

A. When I came in there first it was dark in there and John Sutton was holding a lantern for me, and I

(Testimony of Chris Likits.)

took the center from post to post, took the center and marked out a dap for the twelve-inch timber to go in.

By the COURT.—Tell where that dap was with reference to where the new timber had been put in—the set nearest the base? [200—165]

A. No, it was nearest the next set where we had knocked off working.

Q. That was on the right-hand side of the tunnel, was it not?

A. Yes, sir; looking in it from the Kennecott end.

Q. Looking in towards Chitina, that was on the right-hand side? A. Yes, sir.

Q. He took the brace off there, did he?

A. When I got through squaring up and marking, I said, "Here is a square; you square out your place for yourself," and he took the square and I held the lantern for him, and when he was doing it why the brace was in the way, and he says, "The brace has to come out," and I says to him, "Better don't take it out; we have to see the foreman or put in another one in its place before we take that one off. He says, "It ain't holding nothing, anyhow," and he took a crowbar about so long (indicating) to put between the brace and wall-plate, and pried the brace off, and he went up and took an adz and chopped off the sliver—it was split from the nail down to the lower end; he chopped that sliver off and the brace dropped down. There was a platform there about, I should judge, 8 or 10 ft. from the clear.

Q. What was that brace attached to?

(Testimony of Chris Likits.)

A. It was attached to a segment and to the wall-plate.

Q. And it connected up with those other four segments across there, did it?

A. It connected up with the first segment in the wall-plate, but the two middle segments were resting on it, nailed to it.

Q. Who do you say put that on there?

A. It was Dan Lee, I think, and Lockhart and myself; we three. [201—166]

Q. You say you told him not to take it off?

A. Yes, sir.

Q. Why did you put that on there?

A. Why, I guess to keep them timbers from going ahead, I guess, that first bent going ahead, from moving ahead.

Q. Why didn't you want him to take it off?

A. Well, I thought we shouldn't do any work except the boss told us to do so.

Q. Every time you drove a nail, did you have to have the boss tell you to drive the nail?

A. No, sir.

Q. Why didn't you want him to take that off?

A. Why, I thought it didn't have to come off; we had to put another brace in place of it, before we took that one off.

Q. Why would you have to put one in in its place?

A. To keep that end from going ahead.

Q. What would be the result if that brace was taken off and the timber would go ahead?

A. I guess the first bent would fall down.

(Testimony of Chris Likits.)

Q. What effect would that have on the top of the tunnel?

A. It would have nothing to do with the top. I don't think.

Q. What effect would it have on the side?

A. The side will fall in, I guess, or would.

Q. That is all the work that you and Sutton did that morning before Reeder came?

A. That is all, yes, sir.

Q. Was there any carpenters working there, around those four bents that morning, besides yourself and Sutton?

A. Well, I don't know; I didn't see any. [202—167]

Q. You didn't see anybody?

A. Of course, I saw some excavators down there, going with wheelbarrows full and back.

Q. That was taking the dirt and muck from the former cave-in, taking it out of there?

A. Yes, sir.

Q. Then you are certain that is all the work you did there that morning?

A. Well, I filed a saw before I got into the tunnel—I was filing a saw before I went into the tunnel that morning.

Q. Did you work on the other side of those four bents? A. Not that morning.

Q. That morning, I mean?

A. No, sir; I did not.

Q. Did Sutton? A. No, sir; I don't think so.

Q. You were with him? A. Yes, sir.

(Testimony of Chris Likits.)

Q. You knew what he was doing?

A. He was not there what I know of; he wasn't across.

Q. Do you know whether Reeder did any work on the other side? A. No, I do not.

Q. Did you see anyone with Reeder?

A. I think there was another man there, but I ain't sure whether he was there or not, but I think his partner was there at the time—but I ain't sure of that.

Q. You heard Reeder say that he had done no work there that morning? A. Yes, sir.

Q. Do you know whether that is correct or not?
[203—168]

A. Well, I guess it is, because I didn't see him and couldn't see him; it was dark there, but I heard his voice.

Q. Was the tunnel, these four bents, in the same condition when you returned as when you left them four days before?

A. I don't know. That morning, when I came in from the outside from the Kennecott end, into the tunnel, the lights were shining against the cave, toward the cave, and we came in from the daylight and it was dark back of it, and we could not see very much, and at the time we went into the tunnel the foreman, Dan Lee, says, "Hurry up and get those daps in; we want to raise those posts, and I didn't pay much attention how it was when I came in. I just went at it and tried to get those daps in.

Q. Raise what poles?

(Testimony of Chris Likits.)

A. Those four poles, those posts, that are supposed to go in between those four sets. We were going to reinforce the tunnel, them four sets, in the same shape as was done back of it.

Q. Then, so far as you could observe, there was no changes made in those four bents from the time you left them four days prior to that until you returned?

Q. There may be, I don't know. I don't know anything about it.

Q. You didn't see any changes?

A. I didn't examine or try to look for them.

Q. Did you see any changes?

A. No, I don't think so—nothing I noticed.

Q. You couldn't notice any? A. No, sir.

Q. And didn't notice any changes?

A. No, sir. [204—169]

Q. You examined the side you were working on there? A. No, sir.

Q. You didn't examine it? A. No, sir.

Q. Couldn't you see it?

A. I could see it, yes, a little bit, just from the light, from the lantern.

Q. And you couldn't see any changes?

A. I think, if I remember right, I could see that one of them laggings, they have all been dark and smoky, laying on top of the caps, I could see some of those laggings, a white streak showing up under the cap that morning. The lagging stands on the cap like this, and I see it open up a streak of white there on the lagging; it showed us that it had been moved, the white on it has shifted over.

(Testimony of Chris Likits.)

Q. Do you know whether that condition existed when you left the tunnel four days before that?

A. No, I did not.

Q. You don't know? A. No.

Q. I am going to ask you whether you were called here as a witness from the Kennecott mines by me in this case? A. Yes, sir.

Q. How long have you been in town?

A. Since the 13th of this month, I guess.

Q. I am going to ask you if you remember a conversation between you, Mr. Forrester and Mr. Bates in my office? A. Yes, sir.

Q. I am going to ask you if you did not tell Mr. Forrester, Mr. Bates and myself that the reason that that fell down was [205—170] because that brace was knocked off there by Mr. Sutton?

Mr. COBB.—We object; the witness has been called by the plaintiff in this case and has given the same testimony that he has given now. He was asked fully about that and I think if they wanted to contradict him, the proper time to have laid the foundation for it was then.

Mr. BORYER.—I will withdraw the question. That is all. ♦

Cross-examination.

(By Mr. COBB.)

Q. Had any precautions been taken that you could observe there to secure that roof from falling while those posts and timbers were being put in?

Mr. BORYER.—I object to that as not proper cross-examination. Objection overruled. Defend-

(Testimony of Chris Likits.)

ant allowed an exception.

Q. I will add this to it. While you and Mr. Reeder and the other carpenters were at work?

A. I didn't catch on to that very good.

Q. Had any precautions been taken, any means been taken to secure the roof of the tunnel from falling while you carpenters were putting in those timbers? A. No, not in them four sets.

Q. Not in those four sets? A. No, sir.

Q. Had you worked on the part of the tunnel that had been retimbered before you reached these four sets? A. Yes, I worked on it.

Q. Had any precautions been taken in it there to secure the roof until the new timbers were put in?

A. Yes, sir.

Q. What precautions were taken? [206—171]

A. We put in some posts from the cap to the ground down below—put in some posts there.

Q. But that wasn't done under these four bents?

A. No, sir.

Q. Had that been done would the roof have fallen down and this accident happened?

A. I don't know. I should think the roof would not come down then. I don't think it would.

Q. If the braces and posts had been put under there, in the middle, temporary posts, you think it would not have come down? A. I don't think so.

Mr. COBB.—That is all.

(By Mr. BORYER.)

Q. Who put these other posts in?

A. I think Dan Reeder was there and I and Dan

(Testimony of Chris Likits.)

Lee, the foreman.

Q. You were all working together, were you?

A. Yes, sir.

Q. And you put the posts in the other place, did you? A. Yes, sir.

Q. It was your duty to put them in, was it?

A. We were told to do so.

Q. Now, then, I understood you to say when you were a witness for the plaintiff in this case, that the reason that this fell was because that the segment was not properly attached to the cap; is that correct? Did I understand you correctly?

A. I didn't say so; it was not properly—the joint is just as good that way as any other way providing the weight is equal strength all around; if the weight is all round equal, why the joint is just as good as any other, but the weight [207—172] wasn't there—there was more pressure on one side than the other.

Q. Then if you had put these posts up in the center as you said you had put them in the other place, what effect would that have upon the segment?

A. Well, it would hold up the cap—the post would hold up the cap.

Q. That is the piece that goes across here?

A. Yes, sir.

Q. But it wouldn't hold up the segment if it came down here?

A. No, I don't think so—the cap came down first.

Q. The cap came down first?

A. Yes, sir; she went by the segment and came down first.

(Testimony of Chris Likits.)

Q. What were you putting those posts in there for?

A. Which posts?

Q. The posts that you were cutting the daps for?

A. They were regular sets of timbers for reinforcing the tunnel.

Q. And make it safe? A. Yes, sir.

Q. Every time you put in a post it made it that much safer, didn't it? A. Yes, sir.

Q. So that each post that you put in was as a matter of fact a post of safety, was it not?

A. No, the post wouldn't save anything—it would have to be a full set to make it safe.

Q. It would be one portion of a set that you were going to make, to make it safe? A. Yes.

Q. If you put in the full set it would have been safe? [208—173] A. Yes, sir.

Q. You cannot put them all in at once?

A. No, sir.

Q. You have got to put in one at a time?

A. Yes, sir.

Q. And in putting one in at a time, each one that you put in makes it that much more safe than it was originally? A. Yes, sir.

Q. So that you were making the top or the framework of the tunnel safe, were you not?

A. Yes, sir.

(By Mr. COBB.)

Q. Those new timbers you were putting in there were part of the permanent construction of the tunnel, were they not? A. Which new timbers?

Q. The new timbers, the new bents—the new sets

(Testimony of Chris Likits.)

of timbers that you were putting in there between the old timbers,—that was to be a permanent part of the tunnel? A. Yes, sir.

Q. And that was necessary because it was not properly built in the first instance? A. Yes, sir.

Q. (By Juror PEDERSEN.) As I understand the construction of these segments and these posts, would the segments and the posts be of any service in supporting the tunnel until the cap was put on?

A. No, I don't think so.

(By the COURT.)

Q. Did you have that morning the timbers there ready to put [209—174] up, the set that you were making daps for—were they in the tunnel handy?

A. No, sir; they were not in the tunnel.

Q. Where were they?

A. Dan Lee had taken the measurements, the foreman had taken the measurements and gone outside. I met him going outside and giving orders to the outside foreman to cut these poles and every time we made a set of timbers, they were hard to measure, I had made a pattern to move forth and back, slide up and down on the sides and roof, and we spread that over the roof and we would get the cuts and bevel in shape, the way the tunnel was,—so they fit in.

Q. Ordinarily how long would it have taken you that morning with the men that were there working to have finished the daps and have the timbers ready to put them in place?

A. I think we could have finished that day.

Q. With that one set?

(Testimony of Chris Likits.)

A. No, that whole four sets—we could have finished that day.

Q. That one set, how long before you would have had the daps cut? I mean—

Q. Ordinarily considering the way you work and do the work and the number of men you had there, before you would have been ready to have erected and put in place the first set of timbers you were working at?

A. I don't know, there is a difference in the timber; sometimes you strike big knots in them—it's spruce timber and hard to cut; we have to cut down something like four inches, pretty near in two and have to split them out with wedges, iron wedge or something and that takes sometimes quite a [210—175] long time to cut or split up.

Q. Was it, has it been and is it, the custom to bring the timbers in and have them ready as soon as you have the daps cut?

A. It used to be they had three or four sets ready at once.

Q. That morning were the plans to have the timbers ready for you when you got the daps cut?

A. I don't know that.

Q. (By Juror CHAMBERLAIN.) Is this crew that was working inside the tunnel at this timber work under the direction of a foreman all the time?

A. How is that?

Q. Was the crew working at this timber work inside the tunnel under the direction of a foreman all the time? A. Yes, sir.

(Testimony of Chris Likits.)

(By Mr. BORYER.)

Q. The foreman was working there with you?

A. Not that morning—he just went out that morning to give the length of the posts—that is what I understand.

Q. That is, he had taken the measurement or you had taken the measurement of the post?

A. I didn't take the measurement. I guess the foreman did.

Q. He had taken the measurement of the post and he had gone to the end of the tunnel where you kept your timber for the purpose of getting the post; is that correct? A. Yes, sir.

Q. You kept your timbers at the edge of the tunnel?

A. No, they were about three or four hundred feet from the end of the tunnel.

Q. It was out there at the end of the tunnel towards Kennecott, [211—176] was it?

A. Yes, outside the cut.

(By Mr. COBB.)

Q. Besides the carpenters that were working on this job of reconstructing the tunnel, was there any other workmen there, any other employees?

A. Yes, there was excavators there.

Q. And anybody else taking the cars out?

A. There was a foreman for the excavators.

Q. And a foreman for the carpenters?

A. Yes, sir.

Q. And was anybody in charge of the entire work, directing how the entire job was to be done?

(Testimony of Chris Likits.)

A. Yes, sir.

Q. Who was that? A. Mr. Forrester.

Q. He had general supervision of this entire job?

A. I think so.

Q. The carpenter foreman was under him?

A. Yes, sir.

Q. And the excavator foreman? A. Yes, sir.

Q. And the car men? A. Yes, sir.

Q. He was in charge of the whole job of constructing this tunnel? A. Yes, sir.

Q. (By Mr. BORYER.) By excavators you mean the men that were taking the muck from the cave-in prior to that? A. Yes, sir.

Witness excused. [212—177]

[Testimony of J. W. Forrester, for Defendants.]

J. W. FORRESTER, a witness called and sworn in behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. BORYER.)

Q. What is your name? A. J. W. Forrester.

Q. Where were you employed on the 7th day of August, 1911? A. Chitina.

Q. How long had you been employed there?

A. From the 13th of July.

Q. Up until the 7th day of August? A. Yes, sir.

Q. And including the 7th day of August?

A. Yes, sir.

Q. What work were you doing there?

A. Retimbering the Chitina tunnel.

Q. I hand you Defendants' Exhibit #6 and ask

(Testimony of J. W. Forrester.)

you to explain fully and in detail to the jury just what work you were doing and the manner of retimbering the tunnel and the manner in which you proceeded. Explain fully.

A. These sides here represent the old sets, the sets made out of round spruce timber, native timber, the entire set, the post and segment, all the way around; these were put in originally four feet apart and I was putting in 12x12 timbers halfway between each one of the old sets.

Q. (By JUROR.) What you were putting in was a complete set also?

A. Yes, sir; it was put in differently from that set but it was a set of the same arch exactly as the set shown there. We were also changing the mudsills. The mudsills under the old sets were made out of hewn timber and we were taking those out and excavating deeper and putting in 8x18 mudsills. [213—178] That is about all there was to the work we were carrying on, in a general way, at the time.

Q. You left the old sets there?

A. Yes, we left the old sets there and put in the new sets in between to reinforce and make the tunnel stronger.

Q. What was your object in doing this work?

A. To make the tunnel safe.

Q. Now, then, tell the jury how far you had proceeded up to about the 7th day of August, 1911, the time of the cave-in.

A. We had worked up to a point within four sets of where the tunnel had caved in before I went to

(Testimony of J. W. Forrester.)

work at it—that would be a space of 16 ft.

Q. Then you had retimbered the tunnel from the end toward Kennecott up to within four bents of where the other cave-in happened? A. Yes, sir.

Q. What work was done on these four bents, if any?

A. I had taken out the old mudsills—on one side the new mudsills had been put in.

Q. On one side—on which side do you mean?

A. Looking—standing in the Kennecott end and looking towards Chitina it would be on the right hand side.

By the COURT.—Explain which way the mudsills run.

A. The mudsills ran parallel with the tunnel—each mudsill four posts, 16 ft. long.

Q. You had taken out both mudsills and you had put one mudsill in? A. Yes, sir.

Q. Now, then, what would be the next step after putting that mudsill in? [214—179]

A. The next step after putting the mudsill in would be to wedge up the posts on that side, make them tight.

Q. There would be four upright posts then in that mudsill? A. Yes, sir.

Q. Had those posts been wedged up?

A. Yes, sir.

Q. By whom was that work done?

A. By Dan Lee, the foreman and his gang.

Q. Whose duty was it to wedge up those posts?

A. It was the duty of the timber gang, Dan Lee's gang.

(Testimony of J. W. Forrester.)

Q. Who composed that gang, if you know?

A. I don't remember. I can't recall all of them—I can name a few of them.

Q. Name those you know.

A. There was Dan Lee, Chris Likits, John Sutton, John Nord, and Billy Wilds—there might have been one or two more; I don't remember now.

Q. I believe you stated that the first thing to do after you had gotten your mudsill in would be to brace the upright post; is that correct?

A. After we put the mudsill in, we wedge the post up.

Q. You mean the four posts? A. Yes, sir.

Q. It was necessary to take out the mudsills for the purpose that you were trying to accomplish in this work, was it? A. Yes, sir.

Q. After you had your posts wedged up, what was your next step?

A. After we put in the mudsill and wedged up the old post, the next step was to put up the new post.
[215—180]

Q. What steps, if any, had been taken to put up the new posts?

A. Well, we had gotten this far—Dan Lee, the foreman, that day was going to put up the new sets and he had gone in there that morning and measured the first set of posts and had gone outside to give the measurements to the framework foreman out in the yard.

Q. Had any of the new posts on the right-hand side been put in? A. No, sir.

(Testimony of J. W. Forrester.)

Q. Had any changes been made in the top of the tunnel or the segments? A. At what time?

Q. At any time.

A. Yes, we had put in some work, several different times, to support the roof of the tunnel, when it showed signs of weakness.

Q. Had any steps been taken on this particular place, these four bents?

A. Well, there had in this way—I timbered it in such a way or braced it in such a way that I thought to avoid any accident that might occur. It showed no signs of weakness at all that could be seen.

Q. What had you done?

A. I nailed a 3x12 plank, spiked a 3x12 plank across the segments to keep them from separating apart, and braced it from the middle of that plank down on the posts, and put a round timber that caught half on the wall-plate and half on the top of the post, to keep the wall-plate or the post from coming in at the top, and I also had taken a 3x12 plank and spiked that to the last span and segment to keep the segment from tipping forward and letting the [216—181] lagging drop through.

Q. I would ask you, who did that work.

A. Dan Lee and his gang.

Q. Was Mr. Reeder one of his men?

A. He was one of his gang; yes, sir.

Q. Was he working there at the time?

A. He was there at least when part of this work was done.

Q. I wish you would show the jury on that ex-

(Testimony of J. W. Forrester.)

hibit that you have, Defendants' Exhibit 6, show and explain to the jury just what you did.

A. This view here would be a view of the side of the tunnel—if you were standing down in the middle of the track, in the middle of the railroad track and looking up at it.

Q. I ask you to stand down here at this end and explain it to the jurors on this end and then go forward and explain it to the jurors on the other end, so they can all see it.

A. These caps were round timbers—

By Mr. COBB.—Is this looking at the top of the tunnel?

A. Yes, at this portion where this brace is in, would be looking up at the segments.

Q. Straight overhead?

A. No, overhead in the side of the tunnel. These caps were round timbers, probably anywheres from 8 to 12 inches in diameter, and these lagging were cut 4 ft. long, and they met on top of these caps and when these were standing plumb, it wouldn't take very much of a brace to hold it there one way or the other, so I put up this brace and nailed it up there and brought it back here and spiked it down here, so as to keep that last set from tipping forward, to keep it from moving—that was the object in putting up that brace. [217—182]

Q. Now, repeat that.

A. You can see the object of the thing—it held that segment; as long as that stood plumb, why it didn't take much of a brace one way or the other to hold it.

(Testimony of J. W. Forrester.)

That brace was spiked up there to keep it from tipping forward and letting this lagging, which met on the top of these round caps, would keep that from starting down over the round timber or keep it from giving way.

Q. (By JUROR.) Was that a new structure or a new segment you put in there or the old ones?

A. These were all the old timbers—the only new piece of timber shown in that drawing was that 3x12 brace nailed there. The rest were old timbers.

Q. (By JUROR.) That was put there to hold that until you got to it? A. Yes, sir.

(By Mr. BORYER.)

Q. Now, I will ask you why you put that brace in there.

A. I put it there to keep that last segment from tipping forward and letting the roof fall down.

Q. You are familiar with that kind of work?

A. I had done but little tunnel work before I took this job but I have done a good deal of timber work of different kinds.

Q. That was timber work, was it not?

A. Yes, sir.

Q. I will ask you, in your opinion, what would be the result of taking that timber off, which you put on as a brace—if that timber were taken off?

A. I think if it was taken off it would leave that free to [218—183] fall, and if the dirt was working in any way whatever, the natural tendency would be for it to go forward and it would let the roof come in, and if one would move, the others would

(Testimony of J. W. Forrester.)

naturally follow it right down.

Q. I will ask you if you examined the timbers as to their position after the tunnel had caved in?

A. I did, yes, sir, a good while afterwards—I did when we continued the work and dug the muck out.

Q. You dug the muck out from these timbers?

A. Yes, sir.

Q. And took the timbers out? A. Yes, sir.

Q. You know the position that these timbers were lying in, do you? A. Yes, sir.

Q. I will ask you if from your observation of the timbers and the general work as you found it after the tunnel had caved in, the position of the timbers, what in your opinion caused the cave-in?

A. In my opinion it was taking that brace off.

Q. You had put that brace on there for the purpose of holding it up? A. Yes, sir.

Q. Now, I will ask you to tell the jury the position that you found those timbers in, upon which you base your opinion.

A. Well, when we dug the timbers out, the lagging was lying down in here and it was below these caps, and the theory I formed was that the segment and cap tipped forward and let the roof come straight in and this naturally followed. The [219—184] lagging was lying below these segments and these caps. When the tunnel caved in the posts that were standing on the mudsill, where we had the mudsill in, remained standing, they didn't cave in at all, but on the other side, the posts came in, but the lagging

(Testimony of J. W. Forrester.)

was lying almost invariably below the cap and these segments.

Q. Now, then, I will ask you if you did any other work there on these four bents, other than to put this brace up? A. Yes, I did.

Q. What other work did you do?

A. I put across 8x10 struts from one post over to the other and wedged them in so the posts couldn't come together, and they were in on all the bents that hadn't been reinforced, and on the last bent I put in this form of timbering here, with that 3x12 spiked across there and braced up this way so that those couldn't spread apart nor come together, and this log was about 10 inches in diameter and caught the wall-plate and the top of the post, across on both sides. These 8x12 struts were wedged in between the posts there and this brace still remained in here on both sides, the one where the mudsill was in and the one where the mudsill had been taken out.

By the COURT.—Repeat that.

A. This 3x12 strut was across there and held these segments from either separating out so that cap could drop through or coming together. This was braced down this way to tie it and to steady this here and this log strut was across, caught both the wall-plate and the top of the post. This 8x12 was wedged across here to keep them from working [220—185] in,—those braces were in here to support the post while we took the old mudsill out and put the new one in—to keep them from falling out.

Q. Did this plank come clear across?

(Testimony of J. W. Forrester.)

A. Yes, sir. You can follow this line here—that represents the line of muck. The tunnel was originally frozen. There was no muck on the outside; on your timbers here, directly around this set, it was bare—there was no muck directly around that set. I can show you, for instance, this set of timbers here, that set there. That is the last end set and that muck had worked out until it was across something like that, the line would cut about there, like that. There was muck behind the joint of the segment and the wall-plate and the post, but there was no muck behind the joint of the cap and the segment, up there, but this lagging all the way down across here had wedged because the muck came ahead of this joint here. This was where it gave way here.

Q. Now, who did this work that you are just describing?

A. The work was done by Dan Lee and his gang, and there was some work done in there by Shorty McFarland and his gang.

Q. By the carpenter gang? A. Yes, sir.

Q. Then it was the carpenters who did this work, was it? A. Yes, sir.

Q. It was their duty to do this work?

A. Yes, sir.

Q. By that I mean that that was the nature of their employment. A. Yes, sir.

Q. Had you given any instructions to the men regarding looking [221—186] out for their safety or otherwise there?

A. Yes; I had given implicit instructions to the

(Testimony of J. W. Forrester.)

foremen to look out for themselves and to look out for their men, and I think I had cautioned every man on the job.

Q. You realized that it was work that was more or less dangerous? A. Yes, sir.

Q. Did you give any instructions about the removal of braces or anything there? A. Yes, I did.

Q. What, if any, instructions did you give?

A. I told Mr. Estabrook, a man I had helping me and looking out for things generally, I told him that there never was any timber to be removed out of the tunnel or any brace taken out without my or Dan Lee's sanction, and I told him to look out for it.

Q. Was Mr. Estabrook working there at the time?

A. Yes, sir.

Q. What was he doing?

A. He was helping me—he was looking out for things generally watching the timber, etc.

Q. I will ask you if there has been any other cave-in or trouble with this tunnel since it has been retimbered. A. No.

Q. When were you in the tunnel last prior to this accident? A. The evening before.

Q. What time in the evening?

A. Quitting time—either at 6 or 6:30, I couldn't say which. I don't remember whether we were working ten or eleven hours at that time. [222—187]

Q. The accident happened in the morning about what time?

A. I think it was about 7:15 or 7:30.

(Testimony of J. W. Forrester.)

Mr. BORYER.—That is all.

Cross-examination.

(By Mr. COBB.)

Q. If you will just stand up there a minute. Now, that represents the timbering that you had on the last bent, next to the old cave-in?

A. Yes, sir, on the very last bent.

Q. There was no such timbering as is indicated here on the other three bents.

A. No, with the exception of these 8x12 struts.

Q. To keep the posts from coming in?

A. Yes, sir—and this brace ran back here.

Q. A longitudinal brace? A. Yes, sir.

Q. Were they on the segments or on the posts?

A. They were nailed on the segments of this last bent and ran on down past the segments into the wall-plate.

Q. There was no such timbering as is indicated in this drawing except on the last set of timbers next to the cave-in, with the exception of the longitudinal brace and the braces that upheld the posts while the mudsills were being put in there, that is correct?

A. Yes, sir.

Q. There was no such braces as that put on the two middle sets of timbers? A. No, sir.

Q. Now, the timbering that you put up, even on this last brace, or this last set of timbers, did not strengthen the roof? [223—188]

A. Yes, sir, I think they did.

Q. Except, I will add, that it might prevent it tipping forward or the timbers coming apart?

(Testimony of J. W. Forrester.)

A. Yes, and it kept the last bent from separating apart and letting the cap fall through.

Q. It didn't in any way tend further to support the timbers except to prevent them separating apart?

A. The 3x12 plank spiked acrossed prevented the segments separating apart and letting the cap through and the brace down along the segments prevented the last bent from falling forward and letting all of them fall down.

Q. It didn't, however, add anything to the strength of the caps? A. No, sir.

Q. Did you tell the jury your age?

A. 25 years old.

Q. How long have you been in the employ of the defendant companies? A. Since April, 1908.

Q. What experience in tunneling work had you had prior to this? A. About six months.

Q. Where? A. In Seattle.

Q. You stated that you were engaged in the work of making this tunnel safe? A. Yes, sir.

Q. Why was it unsafe?

A. It was unsafe on account of the timbers being weak, faulty construction.

Q. Now, there is one matter that you can tell us about—what was the length of the tunnel? [224—189]

A. About 450 ft.

Q. Was the construction through the entire length of the tunnel as it was originally built the same?

A. As it was originally built, I suppose it was—there was about 185 ft. of it that I never examined.

(Testimony of J. W. Forrester.)

Q. That you never saw? A. No.

Q. All of it that was left there was the same sort of construction that has been described here?

A. Yes, the same general plan of construction.

Q. The 185 ft. that had given way before this cave-in, where did that begin with reference to the four bents that gave way at the time of this particular accident on the 7th of August?

A, I couldn't say. I wasn't there when it occurred.

Q. Do you know where this cave-in was?

A. Yes, but you asked me where it began—I couldn't say where the trouble started.

Q. I mean, where did it begin with reference to locality, and where did it extend to?

A. It started in about 50 ft. from the Chitina end of the Chitina portal of the tunnel and extended about 184 ft. towards the Kennecott end of the tunnel.

Q. How far did that 184 ft. bring it from these particular four bents that gave way on August 7th?

A. Brought it right up against it.

Q. At that time they had retimbered all of the tunnel that had not caved in with the exception of these four bents? A. Yes, sir.

Q. That part of the tunnel up to that time had never given way? [225—190] A. No, sir.

Q. But it did give way, the same construction, right up next to it? A. Yes, sir.

Q. Going through this hill, is there any irregularities in the height or different pressure on that tun-

(Testimony of J. W. Forrester.)

nel? A. You mean the contour over the hill?

Q. Yes. A. Yes, there is.

Q. Dan Lee, you say, was the foreman of a certain carpenter gang there? A. Yes, sir.

Q. Where is Dan Lee?

A. I don't know where he is now.

Q. Has he gone out? A. Yes, sir.

Q. Dan Reeder and Chris Likits are here?

A. Yes, sir.

Q. Where is John Nord?

A. He is in Norway.

Q. Where is John Sutton? A. Dead.

Q. Where is Wilds? A. I don't know.

Q. How many other gangs of carpenters were at work on that job? A. One other gang.

Q. McFarlands? A. Yes, sir.

Q. Did you see Dan Reeder the day before—were you in the tunnel then? [226—191]

A. I don't recall seeing him the day before in the tunnel. I do not recall seeing him any place the day before.

Q. Do you know where he was at work three or four days before that? A. I can't recall.

Q. You know he hadn't been in that tunnel, don't you? A. No, I do not.

Q. You don't know that? A. No.

Q. You had entire charge of this work, did you not?

A. Under Mr. Wernicke's supervision.

Q. He was your superior? A. Yes, sir.

Q. Who is Mr. Wernicke—what was he?

(Testimony of J. W. Forrester.)

A. Division engineer.

Q. You had charge of this entire force?

A. Yes, sir.

Q. The men who were doing the work of repairing and reconstructing that tunnel? A. Yes, sir.

Q. Now, I wish you would repeat to the jury the instructions you gave there to the men about their safety.

A. I told the foremen to look out for themselves and men. All the time they were working in that tunnel they realized that they were taking more or less chance.

Q. Is that all the instructions you gave them?

A. I don't recall now. I probably gave them various instructions in regard to looking out for themselves.

Q. Did you ever go in there and examine this work ahead to see what was necessary to be done in order to make it safe? [227—192] A. I did.

Q. And take the proper steps to that end?

A. I did.

Q. And yet you say all the instructions you gave them were to look out for themselves?

A. I gave them various instructions in regard to timbers, to put up, to strengthen the old work, so they could carry on the work of retimbering.

Q. Who was Mr. Estabrook, that you said you told to look out that no timbers intended to secure the safety of the men were removed with yours or Dan Lee's sanction—what was he doing, what was his business out there?

(Testimony of J. W. Forrester.)

A. He was on the pay-roll as a rodman, I believe.

Q. Did you keep him in the tunnel to see that that was done?

A. He was in the tunnel practically all of his time.

Q. Was he in there at the time of the accident?

A. No, sir; he was not in there that morning.

Q. Did you issue those instructions to all of the men, not to touch any of these braces that you had ordered put up, at any time?

A. I issued them to the foremen and to Mr. Estabrook.

Q. That was all?

A. I couldn't say that I instructed the men to that effect, but I think no doubt I did.

Q. You think you did?

A. I think, undoubtedly, I did.

Q. You don't know for sure?

A. No, I couldn't swear to it.

Q. You said a while ago that Mr. Reeder was undoubtedly there [228—193] when a part of the work on these four bents that you describe was done. What day was that?

A. This work was being carried on right up to the time of the accident, and I know that Mr. Reeder was working in there, was working in this gang that was doing this work, and he testified that he had helped put in those struts between the posts, so that would be a part of it that he was there on. I couldn't specify any particulars.

Q. Between these particular posts?

A. Yes, sir.

(Testimony of J. W. Forrester.)

Q. Wasn't it the other posts back of that?

A. No, sir.

Q. You are sure of that?

A. That is the way I understood his testimony; I am not sure of it.

Q. You heard him say that he hadn't been in there for four or five days at least? A. Yes, sir.

Q. Do you mean to question the correctness of that statement? A. No, sir.

Q. You heard the testimony of some of the witnesses here about these uprights being placed in the middle of the tunnel to support them as the work progressed, prior to this time? A. Yes, sir.

Q. Did you order that done? A. Yes, sir.

Q. In each instance? A. Yes, sir.

Q. And you didn't order it done for this particular place? A. No. [229—194]

Q. If it was, it was disobeyed?

A. It was not ordered done.

Q. (By Mr. BORYER.) Why didn't you order it done?

A. The timber at that point showed no signs of weakness whatever, and I didn't consider it was necessary.

(By the COURT.)

Q. Explain to the jury the comparative size of the mudsills of the old and new, and the object of putting in the mudsills.

A. You can see the idea of it here. This represents the cross-ties. We threw down a 4x10—

Q. The ties on which the railroad track rested?

(Testimony of J. W. Forrester.)

A. Yes, sir. We threw down a 4x10 right at the bottom and against the ends of these ties we notched this post here before we dapped or cut this strut, this brace off, at the shoulder there and shoulder here, and before we removed the old mudsill at all, we put those in and drove them in as tight as we could, and then we went to work and dug, made an excavation as it is shown here, took the old mudsill out and put the new mudsill in. The old mudsills were made out of about, I think they were supposed to be, 10x12.

Q. And the new ones?

A. 8x18, and laid down flat.

Witness excused. [230—195]

[Testimony of F. H. Estabrook, for Defendants.]

F. H. ESTABROOK, a witness called and sworn in behalf of defendants, testified as follows:

Direct Examination.

(By Mr. BORYER.)

Q. What is your full name?

A. F. H. Estabrook.

Q. Where were you working on or about the 7th day of August, 1911?

A. I was working at Chitina.

Q. How long had you been working there?

A. Since the 15th or 16th of July, 1911. I don't remember the exact date—one of those two dates.

Q. Under whom were you working?

A. Under Mr. Forrester.

Q. What was your position under Mr. Forrester?

(Testimony of F. H. Estabrook.)

A. I was rodman and did general work for him outside of rodding—that is, work usually done by a rodman, in that kind of a job.

Q. I will ask you, were you working in and around the Chitina tunnel during that time?

A. In and around it, yes, sir.

Q. I will ask you whether Mr. Forrester gave you any instructions in regard to warning the men; if so, tell the jury what instructions, if any, he gave you?

A. Well, one morning—I don't remember the date; it was some time prior to this accident—the men were engaged in putting up some brace, I think it was the time that these cross-struts were put in, and I wouldn't be sure how he came to caution me, if I ever saw anybody removing these to report it at once—his idea was that he might be off the job at that time, and he didn't want them removed without his [231—196] sanction or that of the carpenter foreman; that was the way I interpreted the order.

Q. Were those instructions for you or were they given to you to advise the men?

A. Why, they were just given to me, to watch out for the removal of the timbers and so on.

Mr. BORYER.—That's all.

Cross-examination.

(By Mr. COBB.)

Q. You say just given to you alone, to watch out?

A. Yes, sir.

Q. And you failed to watch out?

A. I wasn't in the tunnel the morning that this

particular thing happened.

Witness excused.

Defendants rest.

Testimony closed.

[Proceedings Had on Motions for Directed Verdict.]

The jury having been excused—

By Mr. BORYER.—At this time I desire to file a motion for a directed verdict. They are separate motions of the Katalla Company and the Copper River & Northwestern Railway Co. (Reads them to the Court.)

By the COURT.—The motions are denied in each case, and exception allowed. I have these two questions in my mind that I will instruct the jury on, and it may be that I will have occasion to instruct the jury that there is not sufficient evidence for the defendants to be held as common carriers. I don't know about that. (Jury returns.)

After argument by counsel the Court instructed the jury as follows: **[232—197]**

INSTRUCTIONS OF THE COURT.

Gentlemen of the Jury:

For a moment, in your mind's eye, go back to the 7th day of August, 1911, and I will state to you what I believe to be the law, which you will be obliged to follow under your oaths in this case.

You are first instructed that an employer of labor is obliged and bound to furnish a reasonably safe place in view of the circumstances of the labor or the work to be done, the surrounding circumstances, and maintain it as a reasonably safe place for the em-

ployees to work in.

It is equally true that an employee, a laborer working for another, assumes all the ordinary risks, dangers and hazards incident to that work, which he knows and comprehends, or which a reasonably prudent man, placed in his position, could or should have known, as a reasonably prudent man. That is to say, in this case, a man placed in the position of Reeder, a man of his age, of his experience, of his intelligence—what a reasonably prudent man would have done in his position.

Taking those two broad principles of law, your duty, then, will be to decide in this case, what was the cause of Mr. Reeder's injury, about which there is no doubt or no contention—that is, the extent of the injury or accident may be a question for you,—what was the real, proximate cause of his injury.

In my opinion, law is common sense. We may differ sometimes as to what is common sense, the broad term,—so sometimes we may differ as to the law. Since I believe it to be founded on common sense, I am going to try to take you along with me in the [233—198] reasoning of the law, as well as giving you the law in this case.

It has been, it seems to me justly, held that if the proximate cause of an injury such as this, was on the part of the employer of the labor, that the employer is liable. It has been held, upon the other hand, that if the proximate cause of the injury was upon the plaintiff himself, Mr. Reeder in this case, or upon one of his fellow-workmen who were working with him, and through no fault of the defend-

ants, then he could not recover.

To illustrate what the law believes to be correct and what is common sense, I will give you two illustrations, founded upon two cases.

Imagine, if you will, that two men are working at this table, one facing this way and one this way and two men similarly working at that table over there, say upon tin or iron plate ware. One of the workmen would be standing with his back to an alley-way 10 or 12 feet wide and the other facing it. That it was the duty of those employed to stand here and do their work and perform their duties. While he was so working, two other men from some other part of the same room came along with a truck, we will say, a four-wheeled low truck, with an ordinary handle, with a cross piece at the end, that you see upon trucks around railroad freight stations outside, where the wheel works very easily under the first axle. And while they were coming in with a load of tinware that was used upon the table in the ordinary course of business, one of the wheels, we will say, dropped into a little hole in the floor, a hole sufficient, a hole sufficiently large with the load upon it to stop the truck for a moment, and the man at the tongue handle, or whatever you may call the steering apparatus by which he was pulling, kinder [234—199] wiggled it as a man naturally would, attempting to pull the load from the hole, with the other man pushing behind the load. That while he was so wiggling and pulling and the other pushing to get it from the hole, a lot of tin or iron ware fell off the truck and injured this first man standing here with his back

to that load and to that hole in the floor.

Now, in that case, altho' the plaintiff there and the boy or man standing here might have known of the hole, it is the law and was so held that even though he knew that, he did not as a part of his employment there have a right to assume or anticipate that he might be injured in the way he was by reason of that hole. That by reason of that hole being in the floor it was the duty upon the employer of these men in that room to have remedied that hole and that, altho' probably the wiggling of the tongue on that load at that particular time caused the tinware to slip off the truck, the real cause, the proximate cause of that injury, was the defect in the floor.

The case of the opposite result, in which the actions of a fellow workman exonerated an employer of labor from an injury was that in which a common derrick was used, which consists, as you all know, I presume, of a boom and a mast, the mast being the upright piece and the boom goes off at an angle. In that instance men were employed to erect the boom and mast and when they were about completed, the base, which would probably be a long piece of wood, depending of course upon the size, length, etc., of the derrick, probably we will say the length of that rug and in dimensions proportionate to hold the load it was calculated to hold—that piece of wood had been placed in position [235—200] and holes bored, through which iron bolts of sufficient size were to be put and the nuts screwed down, of course, to hold it in position. For some reason, either the bolts had been mislaid or had not been completed or something,

on the completion of the work on a certain day, they walked away without putting those bolts in; that was to be left to be completed on a subsequent day but before the derrick was to be used.

Now, it happened that the engineer who had control of the machinery running that derrick knew that, as well as the foreman and the man who was injured. The next day the foreman, who was a fellow-servant to the injured man, ordered an attachment to be made to a piece of stone and the engines to be started and the stone lifted by that derrick. The first pull did not succeed in lifting the stone. The foreman told him to go ahead and lift it; anyhow, he made another pull and of course the bottom of the derrick, not being fast upon the resting piece as it should have been, it very naturally buckled out and gave way at the bottom and the boom of the derrick hit the plaintiff and injured him.

Now, the company in that case was held not liable because they claimed that the proximate cause in that case was the negligence of the foreman who knew that the bolts were not put in there and the company had done all they could to prevent them going ahead and using that derrick until it was fixed. That that was a risk that the company could not in reason have apprehended would happen. They expected that the men would do what their good common [236—201] sense would tell them to do, and they had no right under those circumstances to anticipate that a man would so far forget and fail to do his duty as to start up and use a derrick before the bottom was fastened, and the man in charge in the erec-

tion of the derrick had ordered them not to so use the derrick.

Now, in this case you have got to deal with the tunnel, with the tunnel as it existed on August 7, 1911.

You must realize under the uncontradicted and admitted evidence in the case that it was a hazardous work. You have got to realize, then, that Reeder, so far as the evidence shows you, and I want you to go on the evidence all the way through, not conjecture and guess, but just take the evidence that has been admitted in this court, would know and did know the hazards and incidents and risks of the work, so far as the evidence shows.

Do not let what I have said there be misconstrued to mean that I am telling you what Mr. Reeder knew. I want you to take the evidence and then find what or how much Mr. Reeder did know of the conditions existing in the tunnel at the time of the accident—that is the question that you gentlemen must ultimately find in this case, not what I think or what the attorneys think or what Reeder himself thinks, except so far as it helps you reach a conclusion as to what he knew from his evidence as given in the case.

Taking that into consideration and then finding out what the duty of the employer was, the duty of either one of them, as you may find in the case, with reference to the work going on there that morning, and then discover which [237—202] or what was the cause of that accident. If the cause of the accident was one which Mr. Reeder knew, understood, comprehended or a reasonably prudent man of his age,

intelligence, experience and all that should have known, and through no fault then of the defendants, why then Mr. Reeder of course could not recover.

Or if you should find in this case that Mr. Reeder knowing all the conditions up there at that time, comprehended them, knew them, and that the immediate cause, the proximate cause of that injury as I have tried to describe to you, was the tearing off of a brace up there on the part of one of his fellow-employees, not known or directed by the company, which they could not anticipate, if that was the cause of that injury, then of course Mr. Reeder could not recover. It would be the act of his fellow-employee. Or if the accident happened through some negligence on the part of Reeder himself, he could not recover.

But if, on the other hand, taking into consideration what Reeder did know, comprehend and understand about the work and his employment there, there still was a negligence on the part of the company that he did not know, comprehend and understand, or as a reasonably prudent man, put in his place, could not have known, comprehended or understood, then the liability would be on the company.

If you find in this case that Mr. Reeder is entitled to recover, then you have the right to consider and must consider the question of damages. An employee injured through the fault or negligence of the company and not of himself is entitled to receive, what again would be common [238—203] sense in my opinion, under the law, and is the law, the expenses he naturally sustains by reason of that injury. The elements most natural are those by way of medi-

cal attendance, so far as the evidence may show in this case that any was given, not paid for, or which Reeder would be obligated to pay by himself, eliminating of course all that had been paid for him, gratuitously. Next the loss of time, if any is shown in this case, by reason of this accident. Reeder if entitled to a verdict in this case should receive compensation for the loss of time, for his occupation in life so far as it has been shown under the evidence and in so far as he has not been compensated by the defendants or either of them or by reason of his work in other capacities since.

By way of illustration: If a man is earning \$150 a month and after a certain injury is able again to go to work and earns \$75, why then the measure of damages would be the difference between \$75 and \$150 or \$75.

Another element is that of pain and suffering. The law assumes that whenever a man receives a physical injury of certain kinds that certain mental anguish and suffering, which is not only physical but mental, follows. That is to be taken into consideration by the jury, basing your findings upon the physical injury, as to what might have been the mental anguish and pain connected with it.

The next element to be considered in damages of this sort in any case is that of future incapacity, in so far as the evidence may show it and there again it is not a matter of conjecture for you, it is a matter for which you are to take the evidence so far as it is given in this case, to [239—204] show, in the event that you consider that element or find it

necessary in this case. On that evidence, if any is given, you have a right to compensate an employee for future incapacity that has resulted from the injury.

In this case there are two defendants sued. It will be necessary for you in case you find against the defendants, or either of them, to find whether one or both of the defendants are liable in this case, and you must find that upon the evidence in the case.

It is your duty in this case to weigh and consider fairly all the evidence that has been given here in the case. You are not at liberty to just say, "I will take some of it and I will throw some of it out. I will consider some and I won't the other," unless you have a legitimate reason for it under the instructions I shall give you.

If you believe that evidence is untruthful or is contradicted by other evidence, facts or circumstances, then you would have a right and it would be your duty to not consider that evidence, but all evidence that you believe to be truthful in this case you must consider and give its proper weight. It is not a place for you gentlemen to put up your own theories of what the law ought to be or what the remedy ought to be, or what your verdict ought to be in this case, unless it is founded absolutely upon the law that I gave you and the evidence that was given in this court, for this reason: If I make a mistake in the law as I have given it to you this morning, both sides have their remedy and would be protected. They can appeal to a higher court who review what I have said, give it their earnest attention, and if I

have made a [240—205] mistake, a new trial is granted or the error corrected.

If when I ask you gentlemen under your oaths to take the matter up in conformity with the law and the evidence you fail to do it, there is no way of remedying it. We don't know whether you have followed it or not; if not, the best that can be said for you is that you have violated your solemn oaths which the citizenship and the very foundation of our country depends upon, but there is no telling how far you have injured one side or the other in the case, that can never be remedied. Therefore, do not take lightly, as I am sorry to say some jurors do, that which I give you as the law and then go into your jury-room and commence telling your opinion of what the law is, which may be at absolute variance to what I have stated, or in direct disregard of it. Think well of what I have said to you, and if you don't understand it or there is any question about it, make your requests in writing and I will instruct you further. Do not make law for yourselves, gentlemen—do not stultify yourselves and your duty as jurors by doing that.

In weighing the evidence of the witnesses you should take into consideration the interest they have in the case, their apparent candor or evasion in giving their evidence, the probabilities or improbabilities of their story, and another thing, the opportunity they had of knowing and seeing the facts about which they testify before you here. In this case I am going to ask you particularly to do what I believe is a reasonable thing to ask of any juror when you go

into your jury-room, so we may not have mistrials. I do not believe it is particularly manly for a juror to go into a jury-room [241—206] and say to eleven other men, “I have made up my mind, gentlemen, what I am going to do in this case,” write out ten or twelve ballots and put them in your pocket and say, “Whenever you vote, here’s mine.” I say that for this reason—every other man is intelligent and has some degree of manhood, of ability and reason, and is to be respected to a certain extent. It may be that you have a superior mind to remember, grasp and understand things, and may be of great assistance to the other eleven men; therefore it is your duty to assist them as far as you can and so far as they will allow you to do it, in discussing what the evidence is in this case and in applying it to the law. These attorneys may have difficulty as you have seen in telling you what they think the law is in this case, although they have been almost unanimous—there is a unanimity in what they said was the law. They would have difficulty in applying the facts to the case possibly, even if they were not biased for their clients. So you may have honest differences of opinion when you get into the jury-room about facts. One might remember that a mudsill was in such and such a place, so wide and so thick and the other might remember it honestly another way and yet when you call his attention to the fact as you remember it, that you remember it the other way for a certain reason, he might immediately coincide with you, whereas if you go at it in a spirit of more or less animosity and bitterness, you might antagonize

the other man and he doesn't want to listen to you.

I say that in this case and you can apply it to any other case you sit in. Be fair to each other, and thereby you will be fair to the Court, the clients and the attorneys on both sides. [242—207]

I don't mean by that, however, that a man must forego or relinquish his honest conviction. Far be it from me to even say or intimate in any way, shape or manner such a thing as that. When you have been fair to each other and yourselves and reached an honest conclusion and conviction in the case, that is your manhood, and in so far as it cannot, after all efforts have been made, be changed and you are conscientious, then that is your verdict, and I do not wish to interfere with that.

You understand when you have reached a verdict in this case that you will sign the form of verdict, and I am going to give you three, on which you unanimously agree.

In conclusion, I will say what I might well have said earlier in these instructions, that when the issues are made up, such as they are in this case, by a complaint, answer and reply, that it devolves upon the person affirmatively alleging a thing to sustain it by a preponderance of the evidence. When the thing is affirmatively stated, such as the complaint in this case, setting out the causes of action—it is not affirmatively stated when it is simply denied in the answer—those things which are set up then in this case in the complaint affirmatively, it would devolve upon the plaintiff to prove by a preponderance of the evidence. Those which are set up in the affirmative

answer in this case stand in the same position as the statements in the complaint and reply on the part of the plaintiff—therefore, what is set up affirmatively on the part of the defendant would be upon him to establish by a preponderance of the evidence.

You may swear the bailiffs. [242A—208]

[Certificate of Official Stenographer to Transcript of Testimony, etc.]

I do hereby certify that I am the official Court Stenographer for the Third Judicial Division, Territory of Alaska; that as such I reported the proceedings in the above-entitled cause, to wit, Daniel S. Reeder vs. Copper River & Northwestern Railway Co. and the Katalla Company; and that the above is a full, true and correct transcript of the shorthand notes taken by me at said trial.

Dated at Valdez, Alaska, this first day of July, 1913.

I. HAMBURGER. [242B]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, and KATALLA COM-
PANY,

Defendants.

Order Allowing, Settling and Certifying Bill of Exceptions.

It appearing to the Court that the defendants have prepared and duly served upon the attorney for the plaintiff herein, within due time, a proposed Bill of Exceptions, and the Judge of said Court having duly designated Saturday, the 19th day of July, 1913, as the time at which he would settle the Bill of Exceptions, and both parties having been informed of the time for settling the Bill of Exceptions as designated by the Judge, and the said matter coming regularly on for hearing for the purpose of settling the said Bill of Exceptions on the 19th day of July, 1913, and attorneys for both parties having been present:

It was thereupon, and is hereby ordered that the proposed Bill of Exceptions be allowed, the same shall be and is hereby settled and allowed as a Bill of Exceptions herein and presented to the Judge of this Court for his certificate.

And it further appearing to the Court that said proposed Bill of Exceptions conforms to the truth and is in proper form, it is therefore ordered that the said bill is a true Bill of Exceptions, and the [242C] same is hereby approved, allowed and settled, and ordered filed and made a part of the record of said cause, and that Plaintiff's Exhibits "A" to "H" inc., and Defendants Exhibits 1 to 6, inc., the originals be sent to United States Circuit Court of Appeals, 9 Circuit, because of their character cannot be inserted in this Bill of Exceptions.

Done in open court this the 19th day of July, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 19, 1913. E. W. Pettit, Clerk. By —————, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [242D]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

Certificate to Bill of Exceptions.

I, Fred M. Brown, Judge of the above-entitled court, do hereby certify that the above and foregoing Bill of Exceptions in the above-entitled cause is a true bill of Exceptions, and the same has been approved, allowed and settled, and ordered filed and made a part of the record of said cause, and that Plaintiff's Exhibits "A" to "H," inc., and Defendants' Exhibits 1 to 6, inc., the originals be sent to

United States Circuit Court of Appeals, 9th Circuit, because of their character cannot be inserted in this Bill of Exceptions.

Done in open court this the 19th day of July, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 19, 1913. E. W. Pettit, Clerk. By ————, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [242E]

*In the District Court for Alaska, Third Division, at
Cordova.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and THE COPPER
RIVER & NORTHWESTERN RY. CO.,
Defts.

Plaintiff's Request for Instructions.

The rule that an employee assumes the risk to which *he exposed* while engaged in the work of making a dangerous place safe, means no more than this: That the employee assumes the risks necessarily inherent in the work of making the dangerous place safe; but he does not assume the risk of dangers caused

by the negligence of the master in failing to take all reasonable precautions to make the place as safe as it can reasonably be made while the employee is engaged in the work of repair; the master cannot escape liability for his negligence simply because the work in which his servant was engaged is in making an unsafe place safe, and therefore is work of an unusually hazardous nature. The employee assumes the risks of the unusual hazards incident in the nature of the work, but not the enhancement of these risks caused by the master's negligence; and although you may find that the plaintiff was put to work in making an unsafe place safe, yet if his injury was caused by the negligence of the defendants they would still be liable. [243]

It is the duty of a master who is carrying on work of an unusually hazardous nature to the lives and persons of his servants to take all reasonable care to safeguard the place where the work is to be performed so as to make it as safe as, under all the circumstances, it can reasonably be made, and to have the work done under such rules as to the *method its* performance as will protect the servants while engaged in the work against all accidents which the master, in the exercise of due care, could reasonably foresee and guard against; and this rule as to the exercise of due care on the part of the master, applies as well to the work of making an unsafe place safe, as to any other work; the servant never assumes the risks of injury from the negligence of the master, unless he knew of the danger caused by such negligence at the time he exposed himself to it.

And in this case, if you find and believe from the evidence that the defendants, or those in charge of the work in the tunnel mentioned in the pleadings, were negligent in failing to take reasonable precautions such as a man of ordinary prudence and experience should have taken, to secure the roof of the tunnel from falling, and thereby unnecessarily increased the risks of injury to the men at work therein, and the plaintiff, at the time he entered the tunnel to work did not know of the conditions as to immediate danger then existing, and that shortly after he did enter the tunnel, and before he had a reasonable opportunity to see and appreciate the danger, was injured by a fall of the roof of the tunnel, and that the accident could have been prevented by the exercise of ordinary care on the part of the defendants, or of those placed in charge of the work, then your verdict should be for the plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 30, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [244]

*In the District Court for Alaska, Third Division, at
Cordova.*

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY et al.,

Defts.

Plaintiff's Request for Instructions.**GENTLEMEN OF THE JURY:**

In this case Daniel S. Reeder, the plaintiff, sues the Katalla Company and the Copper River & Northwestern Railway Co. to recover damages for personal injuries alleged to have been sustained by the plaintiff while in the employ of the defendants. Plaintiff alleges in his complaint that the defendants are corporations, engaged in the business of common carriers by rail in the month of August, 1911, and that plaintiff was in their employ at that time; that on the 7th day of August, 1911, plaintiff was at work by direction of defendants, on their line of railway in a certain tunnel near Mile 131; that while so at work the timbers supporting the roof of the tunnel broke, or gave way, and plaintiff was caught beneath the falling earth, timbers, and gravel, and sustained serious and permanent injuries to his person; that his left leg was crushed and bruised for its entire length and so maimed and injured as to be permanently disabled; that the bones supporting the lower abdomen were broken and crushed, and that by reason of these injuries the plaintiff has been incapacitated for work, has suffered, and will continue to suffer great physical pain, and has been damaged in the sum of \$25,000.00; it is further alleged that the accident in which plaintiff was injured, was caused by the negligence of the defendants in failing to furnish plaintiff a safe place to work; that said place was unsafe by reason of the failure of the defendants to suitably [245] timber said tunnel and protect the

workmen from the danger of cave-ins and falling of material constituting the roof of the bore of said tunnel, all of which was known to the defendants or by the use of reasonable diligence could have been known by them, but that it was unknown to the plaintiff. The *Kalla* Company admits that it is a corporation, and that at the time alleged plaintiff was in its employ, and denies all the other allegations of the complaint.

The Copper River & Northwestern Railway Company admits that it is a common carrier and incorporated, but denies all other allegations of the complaint.

Both defendants plead affirmatively, first: that if plaintiff received the injuries complained of, they were caused by and arose out of risks incident to the employment in which he was engaged, and which risks he assumed. Second: that if plaintiff received the injuries complained of, such injuries were caused by the negligence or contributory negligence of the plaintiff, or by the negligence of a fellow-servant.

These affirmative allegations of the defendants are denied by the plaintiff.

The above and foregoing is a statement of the issues made by the pleadings, and the Court now instructs you as to the rules of law by which you are to be guided in the determination of these issues.

First: A common carrier is a person or corporation engaged in the transportation of freight and passengers, or either of them for hire. If the *Katalla* Company was engaged in transporting freight and passengers or either of them for hire, before and at the time of the accident and injury to the plaintiff,

then it was a common carrier.

Second: A common carrier in Alaska is liable to its employees for all damages which may result from the negligence of any of its officers, agents or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways [246] or works.

Third: Negligence is the failure to exercise that degree of care and foresight which a man of ordinary prudence would exercise in the management of his own affairs, taking into consideration the dangers to be avoided, and the probability or improbability of an accident from the want of such care, and the seriousness of the dangers to be avoided.

Fourth: It is the duty of a master, whether common carrier or not, to provide his employee with a reasonably safe place to work, and to exercise reasonable care to keep it safe; and if the employer fails in this duty he will be liable to the employee for damages the employee suffers by *reason such* negligence.

Fifth: If you find and believe from the evidence in this case that on or about the 7th day of August, 1911, the plaintiff was in the employ of the defendants in a certain tunnel near Mile 131 on the Copper River & Northwestern Railway, and that while so employed the roof of the tunnel fell upon the plaintiff injuring him, and that the falling of the roof was due to the negligence of the defendants in failing to properly timber the same, then you should find for the plaintiff. Or if the negligence was that of any officer, agent or employee of the defendants, and the defendants are common carriers, then the defendants would

be liable as if it was their own negligence.

Sixth: It is the duty of an employer before sending an employee to work in a tunnel, to see that the roof of the tunnel is properly timbered where timbering is required, so as to support the roof, and prevent the same from falling upon, and injuring the employee while at, or going to and from his work. A failure to exercise ordinary care in this respect, is negligence which makes the employer responsible for all damages that may result to the employee therefrom. So if you believe from the evidence that the tunnel in which the plaintiff was put to work on or about the 7th of August, 1911, was not [247] properly timbered so as to support the roof, and that was due to a want of ordinary care as that term has been explained to you in these instructions, on the part of the defendants, then the defendants would be liable for all damages that resulted to the plaintiff, if any, from the falling of the roof of the tunnel upon the plaintiff.

Seventh. If you find for the plaintiff under the instructions *giv* you, you will, in assessing his damages take into consideration the loss of time, if any, he has suffered by reason of said injury, from his trade or vocation, not counting, however, the time for which he was paid by the defendants, or either of them, after the injury, but only such loss of time and wages, if any, as he has suffered since that time as a direct result therefrom. That is one element of damages.

You may also take into consideration the plaintiffs' lessened capacity to work and earn a living in

the future if any such lessened capacity is shown by the evidence; and whether the injuries complained of and shown by the evidence are permanent in character. That is another element of damages. You should also consider the physical pain and suffering, if any, which the plaintiff endured, and will endure in the future, as a direct result of the injury complained of, and allow him such sum therefor as will in your judgment compensate him for such physical pain and suffering. And if you find that as a direct result of the injury complained of the plaintiff has suffered mental pain and anguish from a sense of his maimed condition (if you find he is maimed) and from a sense of his lessened ability to earn a living (if you find his capacity in that respect has been lessened), then you should allow him such sum as in your judgment will compensate him for such mental pain and suffering. The damages you find, if any, should be for such gross sum as in your judgment will fully compensate the plaintiff for all loss of earnings, if any, past and future, and all mental and physical suffering you find he [248] has undergone, or will undergo, not exceeding the sum of \$25,000.00, the amount claimed in the complaint.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 30, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [249]

[Instructions Requested by Copper River & N. W.
Ry. Co.]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER &
NORTHWESTERN RAILWAY COMPANY,
Defendants.

Comes now the Copper River & Northwestern
Railway Company and requests the Court to make
the following instructions in the above case:

I.

You are instructed that the plaintiff alleges
in his complaint that the *defendant* negligent acts
consisted in the failure of the defendants to suitably
timber and protect the workmen employed in said
tunnel from the dangers of cave-in and falling of
material constituting the roof of the bore of said
tunnel, and said negligent acts consisted in the fact
that the defendants failed and neglected to suitably
timber said tunnel so as to protect the workmen by
using old and *weaken* timbers and timbers of in-
sufficient size and strength to have the construction
of the roof of said tunnel properly made, so as to
support the weight which would necessarily be im-
posed thereon; therefore, you are instructed that be-
fore the plaintiff can recover in this case, he must

establish by the preponderance of the evidence that the injury to plaintiff was caused by the defendants using old and *weaken* timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made so as to support the weight which would necessarily be imposed thereon. [250]

II.

You are instructed that the burden is upon the plaintiff to establish his cause of action by a preponderance of evidence, and that the plaintiff cannot recover unless he proves by preponderance of the evidence not only that the defendant was negligent, but also that the defendant's negligence was the cause of the injury to the plaintiff, and if he fails to establish these facts by the preponderance of the evidence the plaintiff cannot recover.

III.

You are instructed that the plaintiff is presumed to know of dangers that he has an opportunity to observe, and that he must inform himself of open, obvious risks, and if he does not do this and is injured by reason of his failure to do so, then he cannot recover.

IV.

You are instructed that the plaintiff assumes the risks of all dangers that he has an opportunity to observe that are open, and that if the plaintiff accepted employment of the defendant in repairing or strengthening the tunnel for the purpose of making it safe, and said tunnel was in an unsafe condition and needed repairing, that the plaintiff, by accepting

such employment, assumed all the ordinary and usual risks and perils incident to such employment, whether it was dangerous or otherwise.

V.

You are instructed that the law requires a person when doing a dangerous piece of work to exercise such care for his safety as an ordinary prudent man would exercise under the circumstances, and unless he exercises such care and is injured by reason of not having exercised such care, he cannot recover.
[251]

VI.

You are instructed that if the plaintiff had actual or constructive knowledge of danger of working at the point where the accident happened, and that a reasonably prudent man under the circumstances would exercise due care to avoid danger, and the plaintiff was injured by reason of his failure to use ordinary care, he is guilty of contributory negligence and cannot recover.

VII.

You are instructed that if the plaintiff continued working with knowledge, actual or constructive, of dangers which an ordinary prudent man would refuse or subject himself to, he is guilty of contributory negligence and cannot recover.

VIII.

You are instructed that if the plaintiff failed to exercise ordinary and reasonable care, which care is such as an ordinary and prudent man would exercise under similar circumstances, he is guilty of contributory negligence and cannot recover.

IX.

You are instructed that if the plaintiff was engaged in strengthening and retimbering the frame of the tunnel at the place where he was injured for the purpose of making the tunnel safe, or if you find that the tunnel was being repaired for making it safe and the plaintiff was injured while assisting in either the work of repairing or fixing or causing the tunnel to be fixed so as to make it safe, then you are instructed that the law does not require of the defendant to furnish either a safe nor a reasonably safe place for the plaintiff to work, and if you find that the plaintiff was injured by the necessary progress of the work in the repairing, fixing and strengthening of the tunnel, he assumed the risks and cannot recover in this action. [252]

X.

You are instructed that if the plaintiff was engaged in strengthening and retimbering the frame of the tunnel at the place where he was injured for the purpose of making the tunnel safe, or if you find that the tunnel was being repaired to make it safe and the plaintiff was injured by reason of one of his co-workers taking or knocking one of the braces off, and that was the cause of the falling in of the timbers and earth which injured the plaintiff, then you are instructed that the plaintiff cannot recover in this action.

XI.

You are instructed that where a servant is employed to assist in repairing or opening up a tunnel which is in a bad condition and out of repair and not

being used by a common carrier, the master does not owe to him the same duty to furnish a safe place as to that portion of its line out of repair and not being used as it does to his servant engaged in the operation of trains upon the roadbed in the ordinary course of business, and he is therefore subjected to greater risks and perils than he would, under ordinary circumstances, and in entering this service to perform this work he assumes the hazards incident to the work, and one of the hazards is the condition of the tunnel he is engaged to repair, and you are therefore instructed that if the plaintiff was injured by reason of the caving in of the tunnel because of the fact that the tunnel was in a bad condition and the plaintiff was assisting in fixing or repairing this bad condition, then you are instructed that the plaintiff cannot recover.

XII.

You are instructed that if you find that the Copper River & Northwestern Railway Company was at the time of the injury to the plaintiff doing a common carrier business, and that the plaintiff was working for the Copper River & Northwestern Railway Company in which his work or employment consisted in repairing the tunnel or making the tunnel safe because it was in [253] a dangerous condition, and the plaintiff knew it was in a dangerous condition, then you are instructed that the plaintiff assumed the ordinary risks and dangers of his employment that was known to him, and those that might be known to him by the exercise of ordinary care and foresight, and he cannot recover in this case.

XIII.

You are instructed that the plaintiff has sued both the Katalla Company and the Copper River & Northwestern Railway Company, alleging that each of them are separate corporations, and that the plaintiff was in the employ of both Katalla Company and the Copper River & Northwestern Railway Company; therefore you are instructed that before you can find that the plaintiff was in the employ of both the Katalla Company and the Copper River & Northwestern Railway, you must find from the evidence that the relation of master and servant existed between the Katalla Company and the Copper River & Northwestern Railway Company at the time of the injury, and if you find that the relation of master and servant did not exist between the plaintiff and Katalla Company at the time of injury, then the plaintiff cannot recover against the Katalla Company, and if you find the relation of master and servant did not exist between the Copper River & Northwestern Railway Company at the time the injury happened to plaintiff, then you cannot recover against the Copper River & Northwestern Railway Company.

XIV.

You are instructed that if you find that the Katalla Company was not doing a common carrier business at the time that the plaintiff was injured, and also doing a common carrier business over that portion of the railroad line upon which the plaintiff was working and at the place where he was injured, you

are instructed that the plaintiff cannot recover in this action.

XV.

You are instructed that before you can find that [254] the Copper River & Northwestern Railway Company was a common carrier at the place of the injury to the plaintiff, the plaintiff must prove that the Copper River & Northwestern Railway Company was offering or holding itself out to carry goods for all persons who tendered or offered goods and the price of carriage, and also find from the evidence that the Copper River & Northwestern Railway Company was carrying goods for all persons who offered or tendered them and the price for carrying them through the tunnel where the plaintiff was injured.

XVI.

You are instructed that the plaintiff alleges that he was in the employ of the Copper River & Northwestern Railway Company on the 7th day of August, 1911, at the time he received his injuries, this allegation is denied by the Copper River & Northwestern Railway Company; therefore, you are instructed that the plaintiff must prove by preponderance of the evidence that at the time he received his injuries he was at that time in the employ of the Copper River & Northwestern Railway Company, and if plaintiff fails to establish that he was in the employment of the Copper River and Northwestern Railway Company at the time he received his injury, then you cannot find a verdict against the defendant, Copper River & Northwestern Railway Company.

XVII.

You are instructed that if the plaintiff was engaged in repairing or strengthening or retimbering the tunnel that was in an unsafe condition, and he failed, along with his colaborers to take precautions in bracing the timbers and the tunnel caved in by reason of the fact that the plaintiff along with his colaborers failed or neglected to brace the timbers or failed to take any steps to prevent the cave-in while they were working, and the defendant had suitable timbers convenient which the plaintiff could have used to strengthen the timbers in the tunnel and prop the tunnel, and failed to do so, then you are instructed that the plaintiff cannot recover in this case. [255]

XVIII.

You are instructed that if you find from the evidence that the Copper River & Northwestern Railway Company was doing a common carrier business at the time and place plaintiff received his injuries, and the plaintiff was employed by the Copper River & Northwestern Railway Company and was engaged in the repair of the tunnel to keep the dirt and earth from caving in, and of making the tunnel safe by timbering said tunnel or by replacing or strengthening the timbers of said tunnel for the purpose of making it safe, then you are instructed that the plaintiff by the acceptance of his employment assumes the ordinary risks and dangers of his employment that are known to him and those that might be known to him by the exercise of ordinary care and foresight and he cannot recover.

XIX.

You are instructed that if you find that the Copper River & Northwestern Railway Company was a common carrier and that plaintiff was working for it at the time of receiving his injury, and his work consisted of work in repairing or making safe a tunnel that was at that time unsafe, you are instructed that the plaintiff assumed the ordinary risks and dangers of his employment that are known to him and those that might be known to him by the exercise of ordinary care and foresight, and that when he engages in making a place that is known to be dangerous, safe, the hazards of the dangerous place are the ordinary and known dangers of such a place, and by his acceptance of the employment, the servant necessarily assumes them, and the Copper River & Northwestern Railway Company cannot be held liable.

XX.

You are instructed that if you find that the Copper River & Northwestern Railway Company was doing a common carrier business, but not doing a common carrier business, at the place or through the tunnel where the plaintiff was injured, [256] then you are instructed that the Copper River & Northwestern Railway Company cannot be held as a common carrier for his injuries received at the place alleged in the complaint.

XXI.

You are instructed that if you find from the evidence that the plaintiff's injury was caused by reason of the negligence of a co-worker or fellow-servant of the plaintiff, that he cannot recover in this action.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 30, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [257]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER &
NORTHWESTERN RAILWAY COM-
PANY,

Defendants.

Instructions [Requested by Katalla Co.].

Comes now the Katalla Company and requests the Court to make the following instructions in the above case:

I.

You are instructed that the plaintiff alleges in his complaint that the *defendant* negligent acts consisted in the failure of the defendant to suitably timber and protect the workmen employed in said tunnel from the dangers of cave-in and falling of material constituting the roof of the bore of said tunnel, and said negligent acts consisted in the fact that the defendants failed and neglected to suitably timber said tunnel so as to protect the workmen by using old and weaken timbers and timbers of insufficient size and strength to have the construction of the

roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon; therefore you are instructed that before the plaintiff can recover in this case, he must establish by the preponderance of the evidence that the injury to plaintiff was caused by the defendants using old and weaken timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made so as to support the weight which would necessarily be imposed thereon.

II.

You are instructed that the burden is upon the [258] plaintiff to establish his cause of action by a preponderance of evidence, and that the plaintiff cannot recover unless he proves by preponderance of the evidence not only that the defendant was negligent, but also that the defendant's negligence was the cause of the injury to the plaintiff, and if he fails to establish these facts by the preponderance of the evidence the plaintiff cannot recover.

III.

You are instructed that if you find that the Katalla Company was at the time of the injury to the plaintiff doing a common carrier business at the point or place where plaintiff was injured, and that the plaintiff was working for the Katalla Company, which work or employment consisted in repairing the tunnel or making the tunnel safe because it was in a dangerous condition, and the plaintiff knew it was in a dangerous condition, then you are instructed that the plaintiff assumed the ordinary

risks and dangers of his employment that were known to him and those that might be known to him by the exercise of ordinary care and foresight, and he cannot recover in this case.

IV.

You are instructed that if the plaintiff was engaged in repairing or strengthening or retimbering the tunnel that was in an unsafe condition, and he failed along with his co-laborers to take precautions in bracing the timbers, and the tunnel caved in by reason of the fact that the plaintiff along with his co-laborers failed or neglected to brace the timbers, or failed to take any steps to prevent the cave-in while they were working, and the defendant had suitable timbers convenient which the plaintiff could have used to strengthen the timbers in the tunnel and prop the tunnel and failed to do so, then you are instructed that the plaintiff cannot recover in this case. [259]

V.

You are instructed that if you find from the evidence that the plaintiff's injury was caused by reason of the negligence of a co-worker or fellow-servant of the plaintiff, that he cannot recover in this action.

VI.

You are instructed that if you find from the evidence that the Katalla Company was doing a common carrier business at the time and through the tunnel where plaintiff received his injuries, and the plaintiff was engaged in the repair of the tunnel to keep the dirt and earth from caving in and of mak-

ing the tunnel safe by timbering said tunnel, or by strengthening the timbers of said tunnel, then you are instructed that the plaintiff by the acceptance of his employment assumes the ordinary risks and dangers of his employment that are known to him and those that might be known to him by the exercise of ordinary care and foresight and he cannot recover in this action.

VII.

You are instructed that if you find from the evidence that the Katalla Company was not a common carrier at the time and place of the accident to plaintiff, and that the plaintiff was engaged in work of making the tunnel safe to prevent caving in and falling of earth by timbering said tunnel or by replacing and strengthening the timbers of the tunnel, and while employed in this work he received his injury, you are instructed that the plaintiff assumes the hazards incident to such work and he cannot recover.

VIII.

You are instructed that if you find from the evidence that the Katalla Company was not a common carrier at the time and place where plaintiff was injured, and that the plaintiff was employed by the Katalla Company and was engaged in the repair of the tunnel that was unsafe, you are instructed that by the plaintiff accepting this employment he assumes the hazards incident [260] to such work and cannot recover in this case.

IX.

You are instructed that if you find from the evi-

dence that the Katalla Company was not doing a common carrier business at the time and place where plaintiff received his injuries, and the plaintiff was engaged in the repair of the tunnel to keep the dirt and earth from caving in and of making the tunnel safe, then you are instructed that the plaintiff by the acceptance of this employment assumes the ordinary risks and dangers of his employment that are known to him and those that might be known to him by the exercise of ordinary care and foresight and cannot recover.

X.

You are instructed that if you do find from the evidence that the Katalla Company was not a common carrier when the plaintiff was injured, you are instructed that if the plaintiff was engaged in the work of making the tunnel safe, then you are instructed that the plaintiff assumed the ordinary and known dangers of the place and he cannot recover.

XI.

You are instructed that before you can find that the Katalla Company was at the time and place where the plaintiff was injured a common carrier, you must find from the evidence that the Katalla Company was at that time offering or holding itself out to carry goods for all persons who tendered or offered them the price of carriage, or find from the evidence that the Katalla Company was carrying goods for all persons who offered or tendered them the price for carrying same through the tunnel where plaintiff was injured.

XII.

You are instructed that the plaintiff has sued both the Katalla Company and the Copper River & Northwestern Railway Company, alleging that each of them are separate corporations, and that the plaintiff was in the employ of both Katalla Company and the Copper River & Northwestern [261] Railway Company; therefore you are instructed that before you can find that the plaintiff was in the employ of both the Katalla Company and the Copper River & Northwestern Railway Company, you must find from the evidence that the relation of master and servant existed between the Katalla Company and the Copper River & Northwestern Railway Company at the time of the injury, and if you find that the relation of master and servant did not exist between the plaintiff and Katalla Company at the time of injury, then the plaintiff cannot recover against the Katalla Company, and if you find the relation of master and servant did not exist between the Copper River and Northwestern Railway Company at the time the injury happened to plaintiff, then you cannot recover against the Copper River & Northwestern Railway Company.

XIII.

You are instructed that if the plaintiff was engaged in strengthening and retimbering the frame of the tunnel at the place where he was injured for the purpose of making the tunnel safe, or if you find that the tunnel was being repaired for making it safe and the plaintiff was injured while assisting in either the work or repairing or fixing or causing the

tunnel to be fixed so as to make it safe, then you are instructed that the law does not require of the defendant to furnish either a safe nor a reasonably safe place for the plaintiff to work, and if you find that the plaintiff was injured by the necessary progress of the work in the repairing, fixing and strengthening of the tunnel, he assumed the risks and cannot recover in this action.

XIV.

You are instructed that if the plaintiff was engaged in strengthening and retimbering the frame of the tunnel at the place where he was injured for the purpose of making the tunnel safe, or if you find that the tunnel was being repaired to make it safe and the plaintiff was injured by reason of one of his co-workers taking or knocking one of [262] the braces off, and that was the cause of the falling in of the timbers and earth which injured the plaintiff, then you are instructed that the plaintiff cannot recover in this action.

XV.

You are instructed that if you find that the Katalla Company was not doing a common carrier business at the time that the plaintiff was injured, and also doing a common carrier business over that portion of the railroad line upon which the plaintiff was working and at the place where he was injured, you are instructed that the plaintiff cannot recover in this action.

XVI.

You are instructed that where a servant is employed to assist in repairing or opening up a tunnel

which is in a bad condition and out of repair and not being used by a common carrier, the master does not owe to him the same duty to furnish a safe place as to that portion of its line out of repair and not being used as it does to his servant engaged in the operation of trains upon the roadbed in the ordinary course of business, and he is therefore subjected to greater risks and perils than he would, under ordinary circumstances, and in entering this service to perform this work he assumes the hazards incident to the work and one of the hazards is the condition of the tunnel he is engaged to repair and you are therefore instructed that if the plaintiff was injured by reason of the caving in of the tunnel because of the fact that the tunnel was in a bad condition and the plaintiff was assisting in fixing or repairing this bad condition, then you are instructed that the plaintiff cannot recover.

XVII.

You are instructed that the plaintiff is presumed to know of dangers that he has an opportunity to observe and that he must inform himself of open, obvious risks, and if he does not do this and is injured by reason of his failure to do so, then he cannot recover. [263]

XVIII.

You are instructed that the plaintiff assumes the risks of all dangers that he has an opportunity to observe that are open, and that if the plaintiff accepted employment of the defendant in repairing or strengthening the tunnel for the purpose of making it safe and said tunnel was in an unsafe condition

and needed repairing, that the plaintiff by accepting such employment assumed all the ordinary and usual risks and perils incident to such employment whether it was dangerous or otherwise.

XIX.

You are instructed that the law requires a person when doing a dangerous piece of work to exercise such care for his safety as an ordinary prudent man would exercise under the circumstances, and unless he exercises such care and is injured by reason of not having exercised such care, he cannot recover.

XX.

You are instructed that if the plaintiff had actual or constructive knowledge of danger of working at the point where the accident happened and that a reasonably prudent man under the circumstances would exercise due care to avoid danger and the plaintiff was injured by reason of his failure to use ordinary care, he is guilty of contributory negligence and cannot recover.

XXI.

You are instructed that if the plaintiff continued working with knowledge actual or constructive of dangers which an ordinary prudent man would refuse or subject himself to, he is guilty of contributory negligence and cannot recover.

XXII.

You are instructed that if the plaintiff failed to exercise ordinary and reasonable care, which care is such as an ordinary prudent man would exercise under similar circumstances [264] he is guilty of contributory negligence and cannot recover.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 30, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [265]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER &
NORTHWESTERN RAILWAY COM-
PANY,

Defendants.

**Defendant's Exceptions to Court's Instructions to
Jury.**

Defendant excepts to the first instruction given by the Court on page 1, to the effect that an employer of labor is obliged to furnish a reasonably safe place in view of the circumstances of labor or work to be done, the surrounding circumstances and maintain it as a reasonably safe place for the employees to work in. Defendant excepts to this instruction for the reason that the facts and evidence of this case show that the plaintiff was engaged in retimbering and strengthening the tunnel in which he was working because said tunnel was not in a safe condition and it was being retimbered and strengthened for the purpose of making it safe, and that the plaintiff

knew that said tunnel was being retimbered and strengthened for the purpose of making it safe. That said instruction required of the defendant a higher degree of safety than the work or employment required.

II.

Defendant excepts to the third instruction on page 1 regarding cause of Mr. Reeder's injury, wherein said instruction states, "Taking those two broad principles of law, your duty then will be to decide in this case what was the cause of Mr. Reeder's injury, about which there is no doubt, or no contention,—that is, the extent of the injury or accident may be a question for you, what was the real, proximate cause [266] of his injury." Defendant excepts to this instruction for the reason that it is confusing.

III.

Defendant excepts to the first instruction on page 2, for the reason that said instruction states that law is common sense and that we differ sometimes as to what is common sense, so sometimes we differ as to law; for the reason that the law is definite and fixed, and from said instructions the jury may have inferred that they had the right to differ from the law as given to them by the Court.

IV.

Defendant excepts to the instruction as to the proximate cause on pages 2, 3 and 4 regarding proximate cause, for the reason that the evidence in this case shows that the tunnel caved in either by reason of a brace having been knocked off or by reason of

the construction of joinder together with a cap or segment supporting said tunnel.

V.

Defendant further excepts to the refusal of the Court to give the following instructions requested by the defendant.

1.

Defendant excepts to the refusal of the Court to give the first instruction requested by the defendant on page 1.

2.

Defendant excepts to the refusal of the Court to give the second instruction requested by the defendant on page 2.

3.

Defendant excepts to the refusal of the Court to give the third instruction requested by the defendant on page 3.

4.

Defendant excepts to the refusal of the Court to give the fourth instruction requested by the defendant on page 4.

5.

Defendant excepts to the refusal of the Court to [267] give the fifth instruction requested by the defendant on page 5.

6.

Defendant excepts to the refusal of the Court to give the sixth instruction requested by the defendant on page 6.

7.

Defendant excepts to the refusal of the Court to

give the seventh instruction requested by the defendant on page 7.

8.

Defendant excepts to the refusal of the Court to give the eighth instruction requested by the defendant on page 8.

9.

Defendant excepts to the refusal of the Court to give the ninth instruction requested by the defendant on page 9.

10.

Defendant excepts to the refusal of the Court to give the tenth instruction requested by the defendant on page 10.

11.

Defendant excepts to the refusal of the Court to give the eleventh instruction requested by the defendant on page 11.

12.

Defendant excepts to the refusal of the Court to give the twelfth instruction requested by the defendant on page 12.

13.

Defendant excepts to the refusal of the Court to give the thirteenth instruction requested by the defendant on page 13.

14.

Defendant excepts to the refusal of the Court to give the fourteenth instruction requested by the defendant on page 14.

15.

Defendant excepts to the refusal of the Court to

give the sixteenth instruction requested by the defendant on page 15. [268]

16.

Defendant excepts to the refusal of the Court to give the sixteenth instruction requested by the defendant on page 16.

17.

Defendant excepts to the refusal of the Court to give the seventeenth instruction requested by the defendant on page 17.

18.

Defendant excepts to the refusal of the Court to give the eighteenth instruction requested by the defendant on page 18.

19.

Defendant excepts to the refusal of the Court to give the nineteenth instruction requested by the defendant on page 19.

20.

Defendant excepts to the refusal of the Court to give the twentieth instruction requested by the defendant on page 20.

21.

Defendant excepts to the refusal of the Court to give the twenty-first instruction requested by the defendant on page 21.

Exceptions allowed this the 5th day of May, A. D. 1913.

PETER D. OVERFIELD,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 5, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [269]

*In the District Court of the Territory of Alaska,
Third Division.*

C—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY, a Corporation and COP-
PER RIVER & NORTHWESTERN RY. CO.,
a Corporation,

Defendants.

Verdict.

We, the jury, duly selected, impaneled, sworn and charged in the above-entitled action, do find for the plaintiff and against the defendants, and each of them, and assess plaintiff's damages at \$5,000.00.

Dated at Cordova, Alaska, this 26th day of April, 1913.

JOSEPH A. BOURKE,

Foreman.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 26, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy.

Entered Court Journal No. C.—2, page No. 56.

[270]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER &
NORTHWESTERN RAILWAY COMPANY,
Defendants.

**Motion [of Copper River & N. W. Ry. Co.] for New
Trial.**

Comes now the Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, and moves the Court for a new trial in this case for the following reasons:

I.

That the plaintiff failed to show or prove by the preponderance of the evidence and failed in any manner to show that the plaintiff was ever in the employ of the Copper River & Northwestern Railway Company, and failed to show that he was in the employ of the Copper River & Northwestern Railway Company at the time he received his injury.

II.

For the reason that the plaintiff has failed to show that the Katalla Company and the Copper River & Northwestern Railway Company are in any manner or way connected with each other or that the Copper River & Northwestern Railway Company or any of its agents were in any way connected with the work

being performed by the plaintiff at the time he was injured, and failed to show that the Copper River & Northwestern Railway Company either owned or was in any way connected with the line of road mentioned in plaintiff's complaint at the time of the injury to the plaintiff.

III.

For the further reason that the plaintiff [271] admitted that he was familiar with the work that he was performing, knew that it was dangerous, knew of the construction of the cap and segment, which he claimed caused his injury, and knew of the danger of such cap and segment at the time he was injured and knew of, prior to his injury, the dangers that caused his injury.

IV.

For the further reason that said Verdict is against the law and evidence of this case.

V.

For the further reason that said Verdict is excessive.

R. J. BORYER,

Attorney for Defendant Copper River & Northwestern Ry. Co.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Apr. 29, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [272]

*In the District Court of the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER &
NORTHWESTERN RAILWAY COMPANY,
Defendants.

Motion [of Katalla Co.] for New Trial.

Comes now the Katalla Company by its attorney, R. J. Boryer, and moves the Court for a new trial in this case for the following reasons:

I.

That the plaintiff admitted in his evidence that at the time he was injured he was engaged in retimbering and strengthening the tunnel because said tunnel was in an unsafe condition; that he knew it was in an unsafe condition and testified in this case that his injury was received from an accident from the caving-in of the tunnel, which cave-in was caused by the faulty construction or joinder of the caps and segments supporting the roof of the tunnel. That he was familiar with and knew of the manner in which the caps and segments were constructed or joined and that he repeatedly noticed the construction and joinder of the caps and segments, knew that they were dangerous and knowing these facts, admitted that he continued work without protest and admitted that he was injured by reason of the cave-in

of said tunnel because of the improper constructions or joinder of said caps and segments, all of which were known to him at the time of the cave-in.

II.

For the further reason that said Verdict is [273] against both the Copper River & Northwestern Railway Company and Katalla Company, and it was not shown in the evidence that the plaintiff was employed by the Copper River & Northwestern Railway Company at the time of his injury or that it was in any way connected with this defendant, Katalla Company.

III.

For the further reason that the Verdict in this case is contrary to the law and instructions and evidence in the case.

IV.

For the further reason that said Verdict is excessive.

R. J. BORYER,

Attorney for Defendant Katalla Company.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. April 29, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [274]

*In the District Court of the Territory of Alaska,
Third Division.*

Special April, 1913, Term—May 5th—22d Court day
—Monday.

Entered Court Journal No. C.—2, Page No. 80.
C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER &
NORTHWESTERN RAILWAY CO.,

Defendants.

Order Denying Motions for New Trial.

Coming on to be heard upon defendants' Katalla Company and Copper River & Northwestern Railway Co., motions for a new trial, filed in the above-entitled cause, J. H. Cobb appearing for the plaintiff and against said motion; R. J. Boryer appearing for defendants and for said motion, and after arguments had by counsel for plaintiff and counsel for defendants, and the Court being fully advised in the premises,—

IT IS ORDERED that said motions and each of them be and they are hereby denied, to which order and ruling of the Court defendants, and each of them, except and exception is duly allowed. [275]

*In the District Court for Alaska, Third Division, at
Cordova.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and THE COPPER
RIVER & NORTHWESTERN RAILWAY
CO., Corporations,

Defendants.

Judgment.

This cause came on regularly to be heard, and came the plaintiff, by his attorney, Mr. J. H. Cobb, also came the defendants by their attorney, Mr. R. J. Boryer, and all parties announced ready for trial; thereupon came a jury of good and lawful men, to wit: Joseph Bourke, and eleven others, who having been duly tried, selected, impaneled and sworn, and having heard the evidence, the argument of counsel, and the instructions of the Court, retired in charge of a bailiff to consider of their verdict; and after due deliberation had, returned into open court the following verdict, to wit:

“We, the jury, duly selected, impaneled, sworn and charged in the above-entitled action, do find for the plaintiff and against the defendants, and each of them, and assess plaintiff’s damages at \$5,000.00. Dated at Cordova, Alaska, this 26th day of April, 1913.

[Signed] JOSEPH BOURKE,

Foreman.”

which said verdict was by the Court received, and ordered filed herein; and the motions for new trial of the defendants having been heretofore overruled and denied, now on motion of Mr. Cobb, for Judgment on said verdict.

It is considered by the Court and so ordered and adjudged, that the plaintiff, Daniel S. Reeder, do have and recover of and from the defendants, the Katalla Company and the Copper River & Northwestern Railway Co., corporations, [276] jointly and severally, the sum of Five Thousand (\$5,000.00) Dollars, with interest thereon from the date hereof at the rate of 8 per cent per annum and all costs of suit taxed at \$100.00 for all of which let execution issue.

Done in open court this 5th day of May, 1913.

PETER D. OVERFIELD,

Judge.

Entered Court Journal No. C.—2, page No. 83.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 5, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [277]

*In the District Court for the Territory of Alaska,
Third Division.*

Special April, 1913, Term—May 5th—22d Court
Day—Monday.

Entered Court Journal No. C.—2, Page No. 81.
No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER
& NORTHWESTERN RY. CO.,

Defendants.

**Order Fixing Time to File and Present Bill of
Exceptions and Granting Stay of Execution.**

Now, on this day, on motion of R. J. Boryer, for an order of the Court fixing the time within which to file and present the Bill of Exceptions in the above-entitled cause and for a stay of execution in said cause; J. H. Cobb appearing for the plaintiff and R. J. Boryer appearing for the defendant, and the Court being fully advised in the premises,

IT IS ORDERED that said defendants be and they are hereby granted 60 days to file and present their bill of exceptions in the above-entitled cause and

IT IS FURTHER ORDERED that a stay of execution be granted for said period. [278]

*In the District Court for Alaska, Third Division, at
Cordova.*

C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY et al.,

Defendants.

Notice of Attorney's Lien.

You will take notice that under and by virtue of a special agreement and contract with the plaintiff, I have an undivided interest of one-half in the judgment in the above-entitled cause, and claim a lien upon said judgment to the extent of one-half the amount thereof.

J. H. COBB.

To the Katalla Company and the Copper River & Northwestern Railway Company, Judgment Defendants, or Mr. R. J. Boryer, Their Attorney of Record.

Service of the above notice admitted and a copy received this 6th day of May, 1913.

R. J. BORYER,

Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. May 6, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [279]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 19, 1913. E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska,
Third Division. Jul. 29, 1913. Arthur Lang, Clerk.
By V. A. Paine, Deputy. [280]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

**Motion for Transfer of All Pleadings and Files to
Juneau, Alaska.**

Comes now the Copper River & Northwestern Rail-
way Company and Katalla Co., by its attorney, R. J.
Boryer, and moves the Court that all of the records
and files in the above-entitled case be transferred
forthwith to Juneau, Alaska, for the following rea-
sons:

That the defendants Copper River & Northwestern
Railway Company and the Katalla Company, desire
to take an appeal from the Judgment entered in the
above-entitled cause and that an Order has been en-
tered extending the time for filing, certifying and set-
tling Bill of Exceptions in this case to and including
the 14th day of July, A. D. 1913, that the attorney, J.
H. Cobb, for the plaintiff, resides in Juneau, and that
this Honorable Court of this Division has been or-

dered to Juneau for the purpose of holding court in that place and will be leaving here on or about the 2d of July, A. D. 1913, and will not be in this Division between the aforesaid date and the 14th day of July, 1913, and for the further reason that this defendant desires to settle and have certified the Bill of Exceptions in the above case between the 2d day of July and the 14th day of July, 1913, and sue out the Writ of Error between said dates, and will be unable to do so unless the files and records are transferred to Juneau.

R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Jun. 26, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [281]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

**Order Transferring Files and Records to Juneau,
Alaska.**

The motion of R. J. Boryer for an order on behalf of the Copper River & Northwestern Railway Com-

pany and Katalla Company, to transfer the records and files in the above-entitled case to Juneau, Alaska, having come on to be heard this day and the same having been duly considered,

It is hereby ORDERED, ADJUDGED and DECREED that the files and records in the above-entitled case be forwarded forthwith to Juneau, Alaska, so as to be in Juneau, Alaska, on or before the 14th day of July, A. D. 1913, and to remain until such time as said files and records are ordered returned to this Division.

Done this the 26th day of June, A. D. 1913.

FRED M. BROWN,
Judge.

Entered in Court Journal No. 7, page No. 284.

[Endorsed]: Filed in the District Court, Territory of Alaska, 3d Div. June 26th, 1913. Angus McBride, Clerk. By Thos. S. Scott, Deputy. [282]

*In the District Court for Alaska, Division No. Three,
at Cordova.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY et al.,

Defendants.

**Stipulation [Extending Time to August 1, 1913, to
Settle Bill of Exceptions.]**

IT IS HEREBY STIPULATED that the time for settling the Bill of Exceptions herein may be ex-

tended to, and inclusive of, August 1st, 1913, and *extension* shall not issue prior to said date.

J. H. COBB,
Attorney for Plaintiff,
JNO. R. WINN,
For R. J. BORYER,
Attorney for Defendant.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 19, 1913. E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska, Third Division. July 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [283]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, and KATALLA COM-
PANY,

Defendants.

Order Allowing Writ of Error.

On this day come the defendants, the Copper River & Northwestern Railway Company and Katalla Company, by their attorney, and filed herein and presented to the Court its petition praying for an allowance of a Writ of Error, and an Assignment of Errors to be

urged by it, praying also that a transcript of the record and proceedings in said cause, with all things concerning the same, be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that the amount of bond for supersedeas in said cause be fixed. In consideration whereof, the Court does hereby allow a Writ of Error as prayed for.

Dated this the 19 day of July, A. D. 1913.

FRED M. BROWN,

Judge for the District Court for the Territory and District of Alaska, Third Division.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 19, 1913. E. W. Pettit, Clerk. By —————, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [284]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY. and KATALLA COM-
PANY,

Defendants.

Motion to Transmit Original Exhibits.

Comes now the defendants and moves the Court for

an order directing the Clerk of Court to send to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, the original exhibits in this cause, said exhibits being numbered: Plaintiff's Exhibits "A," "B," "C," "D," "E," "F," "G," "H" and Defendant's Exhibits "No. 1, 2, 3, 4, 5, 6," for the reason that it is impossible to copy all of said exhibits, and cannot be attached to the Bill of Exceptions.

R. J. BORYER,

Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 19, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [285]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

**Order [Directing Transmission of Original Exhibits
to Appellate Court].**

On motion of the Copper River & Northwestern

Railway Company and Katalla Company, for an Order requiring and directing the Clerk of Court to send to the United States Circuit Court of Appeals for the Ninth Judicial Circuit the original exhibits in this cause, being numbered Plaintiff's Exhibits "A," "B," "C," "D," "E," "F," "G," "H," and Defendant's Exhibits "No. 1, 2, 3, 4, 5, 6," and it appearing to the satisfaction of the Court that said original exhibits should be returned to the Court of Appeals and that said Motion should be granted:

NOW, THEREFORE, it is hereby ORDERED that the Clerk of this Court be and he is hereby authorized and directed to send to the United States Circuit Court of Appeals for the Ninth Judicial Circuit each and all of the said original exhibits in this cause as a part of the return to the Writ of Error in this case.

Dated this the 19th day of July, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 19, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [286]

*In the District Court for the Territory of Alaska,
Third Division.*

C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY, a Corporation, and COP-
PER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
That the Katalla Company, a corporation, and Cop-
per River and Northwestern Railway Company, a
corporation, defendants in the above-entitled action
as principals, and American Surety Company of
New York, a corporation, organized and existing
under the laws of the State of New York, duly
authorized to do business in Alaska and to sign
bonds as surety therein, as surety are held and
firmly bound *until* Daniel S. Reeder, plaintiff and
defendant in error in the above-entitled cause, in the
penal sum of Seven Thousand Dollars, lawful
money of the United States of America, to be paid
to the said Daniel S. Reeder, his successors or
assigns, his executors and administrators, for which
payment well and truly to be made, we bind our-
selves and each of us, and severally, and our and
each of our successors and assigns, firmly by these
presents.

Sealed with our seals and dated this the 11th day of July, A. D. 1913.

The condition of the foregoing obligation is such that

WHEREAS the said Katalla Company, a corporation, and the said Copper River and Northwestern Railway Company, a corporation, defendants in said cause as the above-named [287] principal obligators are suing out a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause entered May 5th, 1913, by the District Court of the United States for the District and Territory of Alaska, Third Division, in favor of said plaintiff for and against said defendants for the sum of Five Thousand (\$5,000.) Dollars and costs.

WHEREAS, the said principal obligators desire to give good and sufficient security in accordance with the statute in such cases made and provided for, all costs and damages to be occasioned by said Writ of Error and to operate as a supersedeas upon such judgment and stay the execution thereof pending the hearing and decision of said Circuit Court of Appeals upon said Writ of Error.

Now, therefore, the condition of this obligation is such that if the above-bounden principal obligators, defendants in said cause, shall prosecute said Writ of Error to effect, and if they fail to make good its plea, shall answer all damages interest and costs, then this obligation shall be void, otherwise

to remain in full force and effect.

COPPER RIVER AND NORTHWEST-
ERN RAILWAY COMPANY, a Cor-
poration.

By R. J. BORYER,
Its Attorney.

KATALLA COMPANY, a Corporation,
By R. J. BORYER,
Its Attorney.

AMERICAN SURETY COMPANY OF
NEW YORK,

[Seal] By EDWARD J. LYONS,
Resident Vice-President.
By S. H. MELROSE,
Resident Assistant Secretary.

The foregoing bond is approved by me as to form
and amount, sufficiency and surety as a cost bond
only.

Dated this the 19th day of July, 1913.

FRED M. BROWN,
Judge. [288]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

Affidavit in Support of Supersedeas Bond.

United States of America,
District of Alaska,—ss.

John R. Winn, being first duly sworn, upon his oath deposes and says: That I am a member of the Bar of the above-entitled court and am acquainted with J. H. Cobb and R. J. Boryer, two other members of said Bar. That this affiant had no connection with the above-entitled case as an attorney until sometime just prior to the 29th day of June, A. D. 1913, at which time I received a telegram from R. J. Boryer from Cordova, Alaska, his place of residence, which telegram stated substantially that he would be in Juneau on the steamer "Alameda" on or about the 29th day of June, and he desired me to see Mr. Cobb and obtain from him a Stipulation for further time in which to settle the Bill of Exceptions and perfect the record for the Appellant Court in the above-entitled cause. However, I did not see Mr. Cobb until Mr. Boryer's arrival at Juneau on the 29th day of June, and at that time I entered the law office of Malony and Cobb in the town of Juneau, found Mr. Boryer and Mr. Cobb engaged in conversation concerning the perfecting of the record in the above-entitled cause for the Appellant Court and obtaining of a supersedeas bond. Mr. Boryer desired thirty (30) days the 14th day of July for the purpose last mentioned, [289] but Mr. Cobb suggested that he thought the record ought to be perfected and a supersedeas obtained by August 1st, which said last-mentioned time was agreed upon by

and between Mr. Cobb and Mr. Boryer in my presence. Then Mr. Boryer stated, "Now, Mr. Cobb, it is understood that you will agree to a stay of execution until the first day of August, until I procure a Surety Company bond to act as a supersedeas during the pendency of the action before the Appellant Court, and that you will accept a Surety Company bond instead of the ordinary bond that is procured in cases of this kind," and Mr. Cobb said that he would agree to these matters, and it was agreed between Mr. Boryer and Mr. Cobb in my presence that the bond should be in the amount of \$25,000.00. That Mr. Cobb then agreed to draw up the Stipulation in this case according to the understanding that he had had with Mr. Boryer. Mr. Boryer then on that day departed for the south and on the following day Mr. Cobb drew up the Stipulation which has been filed in this case and when he presented it to me for my signature I insisted that he should write therein the last clause, which reads as follows: "and execution shall not issue prior to said date," meaning the first day of August. I stated to Mr. Cobb at that time that unless that clause was put in something might happen, that execution might issue before Mr. Boryer could put up a supersedeas bond, and Mr. Cobb wrote the clause in in his own handwriting. There is no question but what Mr. Cobb absolutely agreed that when the Surety Company bond was filed that it was to act as a stay bond pending the decision of the Appellant Court in this case.

JNO. R. WINN.

Subscribed and sworn to before me this the 19th day of July, A. D. 1913.

R. E. ROBERTSON,
Notary Public in and for the District of Alaska,
Residing at Juneau, Alaska, Commission Expiring June 19, 1917.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 19, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [290]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

Affidavit in Support of Supersedeas Bond.

United States of America,
District of Alaska,—ss.

R. J. Boryer, being first duly sworn, upon his oath deposes and says: That he is now and has been at all times attorney of record for the defendants; that Judgment was entered in this case on the 5th day of

May, 1913, at which time the Honorable Peter D. Overfield, the presiding Judge, entered an order allowing until July 14th for settling, signing and filing Bill of Exceptions and a stay of execution during said time. That shortly thereafter the said Honorable Peter D. Overfield was called from the Third Judicial Division, over which he presided, to the First Judicial Division for the purpose of holding court. That shortly after arriving in the First Judicial Division the said court proceeded to the States and during his stay in the States his term of office expired and the Honorable Fred M. Brown was appointed Judge of the Third Judicial Division to succeed the Honorable Peter D. Overfield, after which the Honorable Fred M. Brown was called to the First Judicial Division for the purpose of holding a term of court. That while the Honorable Peter D. Overfield was in Juneau, Alaska, and prior to the appointment of the Honorable Fred M. Brown as Judge of the Third Judicial Division, there was no Judge presiding in the Third Judicial Division, all of which was between the date of entry of Judgment in this case and the time allowed [291] for the settling and signing of the Bill of Exceptions and the stay of execution, to wit, between the 5th day of May, A. D. 1913, and the 14th day of July, A. D. 1913; that by reason of the Honorable Peter D. Overfield being called to Juneau for the purpose of taking up judicial matters in the First Division and his departure for the States, and the Honorable Fred M. Brown being called to the First Judicial Division from the Third Judicial Division for the

purpose of holding court, this affiant found it necessary to take up with the attorney for the plaintiff in this case, J. H. Cobb, a Stipulation extending the time for suing out a Writ of Error and perfecting its Writ of Error including stay bond in this case. That J. H. Cobb, attorney for the plaintiff in this case, resides in Juneau, Alaska, a distance of about 600 miles from Cordova, where this affiant resides, and is only accessible by steamers about every 6 or 8 days; that this affiant wired John R. Winn, of Juneau, requesting him to secure from J. H. Cobb further extension of time to settle Bill of Exceptions and perfect record for Appellant Court in the above case; that this affiant left Cordova for the purpose of going to Juneau to secure a Stipulation from J. H. Cobb regarding the furnishing of a stay bond, signed by the American Surety Company, and the amount of stay bond, and all proceedings necessary to perfecting Writ of Error in the above-entitled case. That upon my arrival in Juneau I took up with Mr. J. H. Cobb the matter of a stipulation extending the time for filing and presenting Writ of Error and stay bond to be signed by the American Surety Company, and the amount of said bond, and that the said conversation took place on Sunday, and it was my understanding from my conversation with Mr. Cobb that he consented and agreed that the defendants were to have until the first day of August, 1913, for the purpose of filing the Writ of Error in the above-entitled case and until said date to secure and file a stay bond in the aforesaid Writ of Error, and that Mr. Cobb agreed that he would

[292] accept a bond in the amount of \$25,000.00, signed by the American Surety Company, which bond he consented could be filed on or before the first day of August, A. D. 1913, and which bond was to act as and be a stay bond pending the decision of the Circuit Court of Appeals on Writ of Error to be sued out in the aforesaid case. That upon this understanding I immediately proceeded to Seattle on the same day for the purpose of securing the aforesaid bond, and did secure said bond according to my agreement with Mr. Cobb, and relying on said understanding returned to Juneau for the purpose of suing out the aforesaid Writ of Error and filing the aforesaid bond according to my understanding with Mr. Cobb. That part of the aforesaid conversation and agreement was in the presence of John R. Winn, an attorney residing in Juneau, Alaska; that I have read the affidavit of John R. Winn, and the same is correct as to the matters and facts therein contained and same took place in my presence. That relying on the above understanding, and it having been agreed that the Stipulation was to be drawn and signed the following day and given to John R. Winn, I proceeded to Seattle for the purpose of getting aforesaid bond, which bond I secured in Seattle, signed by the American Surety Company in the amount of \$25,000.00 as per our agreement, and returned to Juneau for the purpose of having same filed and approved to stay execution in this case pending appeal, and hereby tender said bond at this time in this court in the above-entitled case.

That by reason of the above understanding re-

garding the accepting of the aforesaid bond and filing of Writ of Error, and that the giving of said bond was consented to by plaintiff's attorney, and was to be and act as a supersedeas bond pending the determination by the Circuit Court of Appeals of the Writ of Error in said case if filed on or before [293] August 1st, 1913, this affiant did not file the Writ of Error or the supersedeas bond until such date as they were presented and filed in this Court, otherwise said Writ of Error and bond would have been filed on or before the 14th day of July, 1913.

That this plaintiff, Daniel S. Reeder, in this case, has no property or money exempt from execution, and that if the judgment in this case should be reversed, and execution issued prior thereto against the defendants, the Copper River & Northwestern Railway Company and Katalla Company, said defendants would be unable to recover said money. That the defendant, Copper River & Northwestern Railway Company is the owner of a railroad and right-of-way and equipment for running and operating a railroad, which railroad extends from Cordova, Alaska, to Kennecott, Alaska, a distance of 195 miles, and which road and equipment cost approximately twenty million dollars and is now worth that amount, and is now operating and is solvent and able to respond and pay any final judgment obtained in this case, and unless a supersedeas bond is allowed said Writ of Error and its effect will be defeated.

R. J. BORYER.

Subscribed and sworn to before me this the 19th day of July, A. D. 1913.

[Seal] R. E. ROBERTSON,
Notary Public in and for the District of Alaska,
Residing at Juneau. Commission Expiring
June 19th, 1917.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 19, 1913. E. W. Pettit, Clerk. By —————, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [294]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

Order on Supersedeas Bond.

Copper River & Northwestern Railway Company and the Katalla Company, by their attorney, having filed on the 19th day of July, A. D. 1913, petition for a Writ of Error, Assignment of Errors, and Bill of Exceptions, and said date having been fixed as a day for settling and signing said Bill of Exceptions,

and said Copper River & Northwestern Railway Company and the Katalla Company, by their attorney, having presented a supersedeas bond for approval on said date, J. H. Cobb, attorney for plaintiff, defendant in error, objected to the Court approving said Bond as a supersedeas or allowing a supersedeas, for the reason that the Court has no power to approve or allow said bond as a supersedeas bond or allow a supersedeas after the expiration of sixty (60) days, Sundays excluded, from the rendition of the Judgment. This objection of plaintiff having been taken under advisement and having been duly considered,—

It is hereby ORDERED, ADJUDGED and DECREED that said objection be sustained, for the reason that after the expiration of sixty (60) days, Sundays excluded, from the date of the rendition of the Judgment, this Court does not have power to approve said bond or allow a supersedeas, the time for approving same under the statute having passed.

To which ruling the Copper River & Northwestern Railway Company, and Katalla Company, by their attorney, duly excepted and their exception was allowed.

Dated this the 19th day of July, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 19, 1913. E. W. Pettit, Clerk. By —————, Deputy.

Filed in the District Court, Territory of Alaska,
Third Division. Jul. 29, 1913. Arthur Lang,
Clerk. By V. A. Paine, Deputy. [295]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

Order Staying Execution.

Copper River & Northwestern Railway Company and Katalla Company having presented a Bond to act as a supersedeas bond pending appeal in the above case, and objection having been raised by J. H. Cobb, attorney for plaintiff in this case, to the Court having power to approve said bond as a supersedeas bond, and the said J. H. Cobb having stated in open court that execution in this case would be withheld until counsel for defendants has an opportunity to present its application for stay of execution and supersedeas bond to the United States Circuit Court of Appeals for the Ninth Circuit at the session of said Court in Seattle, Washington, in September 1913,—

NOW, THEREFORE, it is HEREBY OR-

DERED, ADJUDGED and DECREED that execution in this case be withheld until counsel for defendant, plaintiffs in error, has an opportunity to present its application for supersedeas bond and stay of execution to the United States Circuit Court of Appeals for the Ninth Circuit at the session of said Court in Seattle, in September, 1913.

Dated this the 19th day of July, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 19, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [296]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY and COPPER RIVER &
NORTHWESTERN RAILWAY COM-
PANY,

Defendants.

Assignment of Errors.

Comes now the defendants in the above-entitled cause and files the following assignment of errors

upon which they will rely upon its prosecution of the Writ of Error in the above-entitled cause:

1.

The Court erred in excusing the first special venire drawn for the purpose of completing the jury for the April term of Court, and retaining the second special venire which was drawn from and restricted to Valdez and Seward as per order of Court, to which the plaintiffs in error duly excepted and their exception allowed.

2.

The Court erred in denying the defendants' challenge to Juror McNiece, for the reason that said juror on examination admitted that he had served as a juror within the past year in the Third Division in the District Court, to which defendants duly excepted and exception was allowed. Examination was as follows:

Q. (Mr. BORYER.) "You reside in Valdez?"

A. "Yes."

Q. "How long have you resided in Valdez?"

A. "About three years and a half."

Q. "Have you served as a juror within the past year [297] in this division, in this court, as a juror or grand juror?"

A. "Just on a special venire, one case."

Q. "Where was that?"

A. "Valdez."

Q. "At what term of Court?"

A. "The last term of court at Valdez."

Q. "What month was that?"

A. "That was about two months ago."

Q. "Not over two months ago?"

A. "No, not over two months ago."

Mr. BORYER.—"We challenge the juror for cause."

Q. (By the COURT.) "You were just called to serve on one case?"

A. "Yes, a special venire, on one case."

Q. "And you were excused immediately after the one case?" A. "Yes, sir."

By the COURT.—"The challenge will be denied."

Defendants allowed an exception to the ruling.

3.

The Court erred in permitting the witness E. F. Wood over defendants' exception duly excepted to and exception allowed, to the following testimony:

Q. (Mr. COBB.) "Now, I want you to tell the jury the best you can what condition Mr. Reeder was in when you got there and during the time you were there working to get him out—what he was undergoing, if he seemed to be undergoing anything. Try to give the picture that is in your mind of Mr. Reeder when he was underneath there and how he was buried and all about it."

Mr. BORYER.—"We object to the question unless it is shown that he knows what the plaintiff was undergoing."

By the COURT.—"He may answer the question."

Defendant allowed an exception.

A. "He was buried under the timbers and I heard him [298] talking but I couldn't see him. He must have been suffering because I heard him call on the boys to stop them sawing and come and get him."

Mr. BORYER.—"We move to strike the answer as a conclusion and not responsive to the question."

Motion denied. Defendant allowed an exception.

4.

The Court erred in sustaining plaintiff's objection to witness E. F. Wood testifying for what purpose the crew was tearing out the old work in the tunnel, to which defendants duly excepted and exception was allowed, said testimony being as follows:

Q. (Mr. BORYER.) "What were you doing at that tunnel?"

A. "We had the pile-driver in there, the track-driver, rather—we were tearing out some old work that was on this end of the tunnel."

Q. "Tearing out some old work?"

A. "Yes, sir, temporary work."

Q. "For what purpose?"

Mr. COBB.—"We object to that; this was 300 ft. away from where this accident happened."

Objection sustained.

Defendants allowed an exception.

5.

The Court erred in permitting plaintiff to introduce Exhibits "C" and "D" and evidence regarding the Bill of Ladings, and in overruling the objection of plaintiff in error to said testimony, to which rul-

ing plaintiffs in error duly excepted and exception allowed. The proceedings being as follows:

Q. "I will ask you to examine a Bill of Lading that appears to be made out to you, made out to McDonald & Reidy—that is one of the bills of lading made out to your firm."

A. "Yes, sir."

Q. "Did you do quite a good deal of shipping in 1910 and 1911?"

A. "We did considerable." [299]

Q. "Is that a specimen of the sort of bills of lading you got?"

A. "Yes, sir."

Mr. COBB.—"I offer this in evidence."

Mr. BORYER.—"I object to it for the reason that it is a Bill of Lading that purports to carry goods from Cordova to Miles Glacier, when this accident happened at Mile 131, some eighty miles beyond, a destination named in the bill of lading."

Mr. COBB.—"It is over a portion of the same road."

Mr. BORYER.—"I think not."

By the COURT.—"If you connect it up it will be all right."

Q. "These goods were over the Copper River Railway?"

A. "Yes, sir."

By the COURT.—"It may go for what it shows, showing that shipments to Miles Glacier."

Mr. BORYER.—"The reason I made that

statement—because this road has been under construction. There were portions of this road that was constructed and trains were run over that portion of it. There were other portions that were not constructed, that is, it was partially constructed, temporary tracks were laid down but there was no hauling over the other portion of the road. There were licenses that were issued which is available to the plaintiff and issued for only a portion of the road and did not extend beyond certain points.”

By the COURT.—“The objection is overruled; as far as the admission of this particular offer is concerned, it may be admitted for the purpose indicated by the Court.”

Mr. COBB.—“And one of the purposes is to show that the Katalla Company during the year 1911 was carrying on the business of common carrier by rail and was the railroad company.”

Mr. BORYER.—“I wish to make the further objection, for the reason that the bill of lading does not purport to be a bill of lading of the date that the accident happened to the plaintiff.”

By the COURT.—“What is the date of it?”

Mr. COBB.—“May 4, 1911.”

By the COURT.—“Proceed—it may be admitted.”

Defendant allowed an exception.

The Bill of Lading is marked Plaintiff's Exhibit “C” and read to the jury by Mr. Cobb. [300]

Q. “You say you received a great many bills of lading of which that is a specimen?”

A. "Yes, sir."

Q. "Did you receive that bill of lading also, for goods shipped?" (Hands witness paper.)

A. "Yes, sir."

Mr. COBB.—"We offer that in evidence also in connection with the witness' testimony."

Mr. BORYER.—"We object to it for the reason that the receipt or paper purports to be a paper with its destination at Miles Glacier, Mile 49, and for the further reason that it bears the date of May 8—What date is that, Mr. Reidy?"

The WITNESS.—"May 3d."

Mr. BORYER.—"For the further reason that the bill of lading shows, or the paper, that it was issued on May 3, 1911, and is irrelevant and immaterial."

Objection overruled. Defendant allowed an exception. It is admitted as Plaintiff's Exhibit "D."

Mr. COBB.—"That is all."

6.

The Court erred in permitting plaintiff to introduce Exhibits "E" and "F" and evidence regarding the Bill of Lading and it overruling the objection of plaintiff in error to said testimony, to which ruling plaintiff in error duly excepted and exception was allowed. The proceedings being as follows:

Q. "I hand you a bill of lading dated August 16, 1911, purporting to be dated Cordova, Alaska, and issued to O. M. Kinney and ask you if you ever saw that before."

A. "Yes, sir."

Q. "Was that issued to you?"

A. "Yes, sir."

Q. "And the goods shipped out on the line of the road?"

A. "Yes, sir."

Mr. COBB.—"We offer that in evidence."

Mr. BORYER.—"We object to it for the reason that it is not the [301] proper way of showing that the Defendant, Katalla Company, was a common carrier; for the further reason that the bill of lading shows that it was issued on the 16th day of August, 1910, and for the further reason that the goods were consigned to a point this side of the point where the accident happened."

Objection overruled. Defendant allowed an exception. It is marked Plaintiff's Exhibit "E" and admitted in evidence.

Mr. COBB.—"I am going to offer this one in evidence, of the same date."

Same objection; same ruling. Defendant allowed an exception. It is marked Plaintiff's Exhibit "F" and admitted in evidence.

Q. "That was issued to you, was it, in the due course of business?"

A. "Yes, sir."

Mr. BORYER.—"I take it my exception goes to all this evidence."

By the COURT.—"Yes, sir."

Q. "I offer you some dated along in March, 1910, and ask you if that was issued to you?"

A. "No, sir."

Q. "Did you ship any goods out in 1911?"

A. "I think I did; yes."

Q. "Did you get the same kind of bill of lading, from the Katalla Company, operating the Copper River & Northwestern Railway?"

A. "I don't remember now—I shipped from the time the road started. I couldn't tell you what kind of bill of lading I got."

Q. "You have seen a great many of these Katalla Company bills of lading issued here?"

A. "Yes, sir."

Mr. COBB.—"That is all."

7.

The Court erred in permitting plaintiff to introduce in evidence Bills of Lading marked Exhibits "G" and "H" and in overruling the objection of plaintiffs in error to said exhibits, to which ruling plaintiffs in error excepted [302] and exception was allowed. The proceedings were as follows:

Q. (Mr. COBB.) "Did you have occasion during the year 1911 to ship any goods out over the line of the Copper River & Northwestern Railway?"

A. "Not under the Northwestern Hardware Co.'s firm name—the firm's name was Feldman and Gerber in 1911—the firm name changed."

Q. "I will ask you if you ever saw this before (handing witness paper)."

A. "Yes, sir."

Q. "Were these bills of lading issued for shipments on the Copper River & Northwestern Railroad?"

A. "Yes, sir."

Q. "Examine both of them."

A. "Yes, sir."

Q. "Freight paid on them?"

A. "Yes, sir."

Mr. COBB.—"We offer these in evidence."

By the COURT.—"They will be admitted and appropriated marked."

Mr. BORYER.—"We ask for an exception to the ruling. Exception allowed." (They are marked Exhibits "G" and "H.")

8.

The Court erred in denying the Motion made by the plaintiffs in error at the close of the testimony for a Nonsuit of said action as to both defendants, to which each defendant excepted and exception was allowed. The Motions were as follows:

"Comes now the defendant, the Katalla Company, by its attorney, R. J. Boryer, and moves the Court to grant a nonsuit to this defendant, for the reasons:

1.

That the plaintiff has closed his case and has failed to establish that the Katalla Company was a common carrier at the time that the plaintiff was injured, and failed to establish that the Katalla Company was doing a common carrier business over the line and at the place where the plaintiff was injured. [303]

2.

That this action is brought under the Federal Employers' Liability Acts of 1906, 1908 and 1910, which is in derogation of the common law, and

having failed to establish that the Katalla Company was doing a common carrier business at the time of the injury to plaintiff and over the line at the point where the plaintiff was injured, cannot recover at common law in this action.

3.

For the further reason that the evidence in the case introduced by the plaintiff conclusively shows that the plaintiff was employed in retimbering and strengthening of the tunnel upon which he was working, for the purpose of making said tunnel safe, and that he was injured by reason of one of the hazards incident to his work which he knew while working on said tunnel.

4.

For the further reason that the evidence shows that the plaintiff was a co-laborer and a fellow-servant of the laborer who knocked the brace off of the frame-work of the tunnel, and that the knocking off of the brace in said tunnel was the cause of the cave-in which injured the plaintiff.

5.

For the further reason that the plaintiff has failed to establish his case."

"Comes now the defendant, the Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, and moves the Court to grant a nonsuit to this defendant, for the reasons:

1.

That the plaintiff has closed his case and has failed to show that the plaintiff was employed

by the Copper River & Northwestern Railway Company, and has failed to show that the plaintiff was in the employ of the Copper River & Northwestern Railway Company at the time that he received his injury complained of in this action.

2.

For the further reason that the plaintiff has failed to show that the defendant, Copper River & Northwestern Railway Company, was doing a common carrier business at the time the plaintiff was injured as alleged in his complaint, and for the further reason that the plaintiff has failed to show that the Copper River & Northwestern Railway Company was doing a common carrier business over the line at the place where the plaintiff received his injury, and for the further reason that this action is based upon the Federal Employers' Liability Act as passed by Congress of United States in 1906, 1908 and 1910, which Act precludes a recovering at common law. [304]

3.

For the further reason that the evidence shows that the plaintiff was employed at and was engaged in retimbering, strengthening and making an unsafe tunnel safe, which facts were admitted by the plaintiff to be known by him prior to the happening of his injury and was injured by reason by one of the risks incident to his work.

4.

For the further reason that the plaintiff has failed to show that this defendant failed and neglected to suitably timber the said tunnel so as to protect the workmen, by using old and weaken timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon.

5.

For the further reason that the plaintiff has failed to establish his case against this defendant."

9.

The Court erred in refusing to direct a Verdict as to each and both of the defendants' Motions for a Directed Verdict, to which defendants excepted and exception was allowed. The proceedings were as follows:

By the COURT.—"The motions are denied in each case and exception allowed. I have these two questions in my mind that I will instruct the jury on, and it may be that I will have occasion to instruct the jury that there is not sufficient evidence for the defendants to be held as common carriers—I don't know about that."

"Comes now the Katalla Company, by its attorney, R. J. Boryer, and moves the Court for a Directed Verdict in this action for the reasons:

1.

That the plaintiff has closed his case and has

failed to establish that the Katalla Company was a common carrier at the time that the plaintiff was injured, and failed to establish that the Katalla Company was doing a common carrier business over the line and at the place where the plaintiff was injured.

2.

That this action is brought under the Federal Employers' Liability Acts of 1906, 1908 and 1910, which is in derogation of the common law, and having failed to establish that the Katalla Company [305] was doing a common carrier business at the time of the injury to plaintiff and over the line at the point at which the plaintiff was injured, cannot recover at common law in this action.

3.

For the further reason that the evidence in the case introduced by the plaintiff conclusively shows that the plaintiff was employed in retimbering and strengthening the tunnel upon which he was working for the purpose of making said tunnel safe, and that he was injured by reason of one of the hazards incident to his work which he knew while working on said tunnel.

4.

For the further reason that the evidence shows that the plaintiff was a co-laborer with and a fellow-servant of the laborer who knocked the brace off of the frame-work of the tunnel, and that the knocking off of the brace in said tunnel

was the cause of the cave-in which injured the plaintiff.

5.

For the further reason that the plaintiff has failed to establish his case.

6.

For the further reason that the plaintiff has admitted that he was familiar with and knew all of the dangers incident to his work and by which he was injured.”

“Comes now the Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, and moves the Court for a directed verdict in this action for the reasons:

1.

That the plaintiff has closed his case and has failed to show that the plaintiff was employed by the Copper River & Northwestern Railway Company, and has failed to show that the plaintiff was in the employ of the Copper River & Northwestern Railway Company at the time that he received his injury complained of in this action.

2.

For the further reason that the plaintiff has failed to show that the defendant Copper River & Northwestern Railway Company was doing a common carrier business at the time the plaintiff was injured as alleged in his complaint, and for the further reason that the plaintiff has failed to show that the Copper River & Northwestern Railway Company was doing a common carrier business over the line and at the place

where the plaintiff received his injury, and for the further reason that this action is based upon the Federal Employers' Liability Acts as passed by Congress of the United States [306] in 1906, 1908 and 1910, which acts preclude a recovering at common law.

3.

For the further reason that the evidence shows that the plaintiff was employed at and was engaged in retimbering, strengthening and making an unsafe tunnel safe, which facts were admitted by the plaintiff to be known by him prior to the happening of his injury, and was injured by reason of the risks incident to his work.

4.

For the further reason that the plaintiff has failed to show that this defendant failed and neglected to suitably timber the said tunnel so as to protect the workmen, by using old and *weaken* timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon.

5.

For the further reason that the plaintiff has failed to establish his case against this defendant.

6.

For the further reason that the plaintiff has admitted that he was familiar with and knew all of the dangers incident to his work and by which he was injured."

10.

The Court erred in giving the following instruction during the course of the charge to the jury, to which instruction the plaintiffs in error duly excepted and its exception was allowed:

Instruction *excepted* to:

“You are first instructed that an employer of labor is obliged and bound to furnish a reasonably safe place in view of the circumstances of the labor or the work to be done, the surrounding circumstances, and maintain it as a reasonably safe place for the employees to work in.”

11.

The Court erred in giving the following instruction during the course of the charge to the jury, to which instruction the plaintiffs in error duly excepted and its exception was allowed. [307]

Instruction *excepted* to:

“Taking those two broad principles of law, your duty then will be to decide in this case, what was the cause of Mr. Reeder’s injury, about which there is no doubt or no contention—that is, the extent of the injury or accident may be a question for you,—what was the real, proximate cause of his injury.”

12.

The Court erred in giving the following instruction during the course of the charge to the jury, to which instruction the plaintiffs in error duly excepted and their exception was allowed.

Instruction *excepted* to:

“In my opinion law is common sense. We

may differ sometimes as to what is common sense, the broad term,—so sometimes we may differ as to the law. Since I believe it to be founded on common sense, I am going to try to take you along with me in the reasoning of the law, as well as giving you the law in this case.”

13.

The Court erred in giving the following instruction during the course of the charge to the jury, to which instruction the plaintiffs in error duly excepted and their exception was allowed.

Instruction excepted to:

“It has been, it seems to me justly, held that if the proximate cause of an injury such as this, was on the part of the employer of the labor, that the employer is liable. It has been held upon the other hand, that if the proximate cause of the injury was upon the plaintiff himself, Mr. Reeder in this case, or upon one of his fellow-workmen who were working with him, and through no fault of the defendants, then he could not recover. To illustrate what the law believe to be correct and what is common sense, I will give you two illustrations, founded upon two cases.

Imagine, if you will, that two men are working at this table, one facing this way and one this way and two men similarly working at that table over there, say upon tin or iron plate ware. One of the workmen would be standing with his back to an alleyway 10 or 12 feet wide and the other facing it. That it was the duty of those em-

ployed to stand here and do their work and perform their duties. While he was so working, two other men from some other part of the same room came along with a truck, we will say, a four-wheeled low-truck, with an ordinary handle, with a cross-piece at the end, that you see upon trucks around railroad freight stations outside, where the wheel works very easily under the first axle. And while they were coming in with a load of tinware that was used upon the table in the ordinary course of business, one of the wheels, we will say, dropped into a little hole in the floor, a hole sufficient, a hole sufficiently large with [308] *with* the load upon it to stop the truck for a moment, and the man at the tongue handle, or whatever you may call the steering apparatus by which he was pulling, kinder wiggled it as a man naturally would, attempting to pull the load from the hole, with the other man pushing behind the load. That while he was so wiggling and pulling and the other pushing to get it from the hole, a lot of tin or iron ware fell off the truck and injured this first man standing here with his back to that board and to that hole in the floor.

Now, in that case, altho' the plaintiff there and the boy or man standing here might have known of the hole, it is the law and was so held that even though he knew that, he did not as a part of his employment there have a right to assume or anticipate that he might be injured in the way he was by reason of that hole. That by

reason of that hole being in the floor it was the duty upon the employer of these men in that room to have remedied that hole and that, altho' probably the wiggling of the tongue on that load at that particular time caused the tinware to slip off the truck, the real cause, the proximate cause of that injury, was the defect in the floor.

The case of the opposite result, in which the actions of a fellow workman exonerated an employer of labor from an injury was that in which a common derrick was used, which consists, as you all know, I presume, of a boom and a mast, the mast being the upright piece and the boom goes off at an angle. In that instance men were employed to erect the boom and mast and when they were about completed, the base, which would probably be a long piece of wood, depending of course upon the size, length, etc., of the derrick, probably we will say the length of that rug and in dimensions proportionate to hold the load it was calculated to hold—that piece of wood had been placed in position and holes bored, through which iron bolts of sufficient size were to be put and the nuts screwed down, of course, to hold it in position. For some reason, either the bolts had been mislaid or had not been completed or something, on the completion of the work on a certain day, they walked away without putting those bolts in; that was to be left to be completed on a subsequent day but before the derrick was to be used.

Now, is happened that the engineer who had

control of the machinery running that derrick knew that, as well as the foreman and the man who was injured. The next day the foreman, who was a fellow-servant to the injured man, ordered an attachment to be made to a piece of stone and the engines to be started and the stone lifted by that derrick. The first pull did not succeed in lifting the stone. The foreman told him to go ahead and lift it; anyhow he made another pull and of course the bottom of the derrick, not being fast upon the resting piece as it should have been, it very naturally buckled out and gave way at the bottom and the boom of the derrick hit the plaintiff and injured him.

Now, the company in that case was held not liable because they claimed that the proximate cause in that case was the negligence of the foreman who knew that the bolts were not put in there and the company had done all they could to prevent them going ahead and using that derrick until it was [309] fixed. That that was a risk that the company could not in reason have apprehended would happen. They expected that the men would do what their good common sence would tell them to do and they had no right under those circumstances to anticipate that a man would so far forget and fail to do his duty as to start up and use a derrick before the bottom was fastened, and the man in charge in the erection of the derrick had ordered them not to so use the derrick."

14.

The Court erred in failing and refusing to give to the jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that the plaintiff alleges in his complaint that the defendants’ negligent acts consisted in the failure of the defendants to suitably timber and protect the workmen employed in said tunnel from the dangers of cave-in and falling of material constituting the roof of the bore of said tunnel, and said negligent acts consisted in the fact that the defendants failed and neglected to suitably timber said tunnel so as to protect the workmen by using old and *weaken* timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon; therefore you are instructed that before the plaintiff can recover in this case he must establish by the preponderance of the evidence that the injury to plaintiff was caused by the defendants using old and *weaken* timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made so as to support the weight which would necessarily be imposed thereon.”

15.

The Court erred in failing and refusing to give to

the jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that the burden is upon the plaintiff to establish his cause of action by a preponderance of evidence and that the plaintiff cannot recover unless he proves by preponderance of the evidence not only that the defendants were negligent, but also that the defendants’ negligence was the cause of the injury to the plaintiff, and if he fails to establish these facts by the preponderance of the evidence the plaintiff cannot recover.”

16.

The Court erred in failing and refusing to give to the jury [310] the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if you find that the Katalla Company was at the time of the injury to the plaintiff doing a common carrier business at the point or place where plaintiff was injured, and that the plaintiff was working for the Katalla Company, which work or employment consisted in repairing the tunnel or making the tunnel safe because it was in a dangerous condition, and the plaintiff knew it was in a dangerous condition, then you are instructed that the plaintiff assumed the ordinary risks and dangers of his employment that were

known to him and those that might be known to him by the exercise of ordinary care and foresight and he cannot recover in this case.”

17.

The Court erred in failing and refusing to give to the jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if the plaintiff was engaged in repairing or strengthening or re-timbering the tunnel that was in an unsafe condition and he failed along with his co-laborers to take precautions in bracing the timbers and the tunnel caved in by reason of the fact that the plaintiff along with his co-laborers failed or neglected to brace the timbers or failed to take any steps to prevent the cave-in while they were working and the defendant had suitable timbers convenient which the plaintiff could have used to strengthen the timbers in the tunnel and prop the tunnel, and failed to do so, then you are instructed that the plaintiff cannot recover in this case.”

18.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if you find from the evidence that the plaintiff’s injury was

caused by reason of the negligence of a co-worker or fellow-servant of the plaintiff that he cannot recover in this action.”

19.

The Court erred in failing and refusing to give to the jury the [311] following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if you find from the evidence that the Katalla Company was doing a common carrier business at the time and through the tunnel where plaintiff received his injuries, and the plaintiff was engaged in and of making the tunnel safe by timbering said tunnel, or by strengthening the timbers of said tunnel, then you are instructed that the plaintiff by the acceptance of this employment assumes the ordinary risks and dangers of his employment that are known to him and those that might be known to him by the exercise of ordinary care and foresight and he cannot recover in this action.”

20.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if you find from the evidence that the Katalla Company was not a common carrier at the time and place of the

accident to plaintiff and that the plaintiff was engaged in work of making the tunnel safe to prevent caving in and falling of earth by timbering said tunnel or by replacing and strengthening the timbers of the tunnel, and while employed in this work he received his injury, you are instructed that the plaintiff assumes the hazards incident to such work and he cannot recover.”

21.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if you find from the evidence that the Katalla Company was not a common carrier at the time and place where plaintiff was injured, and that the plaintiff was employed by the Katalla Company and was engaged in the repair of the tunnel that was unsafe, you are instructed that by the plaintiff accepting this employment he assumes the hazards incident to such work and cannot recover in this case.”

22.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiff in error, which was [312] duly excepted to, and exception allowed.

Instruction:

“You are instructed that if you find from the

evidence that the Katalla Company was not doing a common carrier business at the time and place where plaintiff received his injuries and the plaintiff was engaged in the repair of the tunnel to keep the dirt and earth from caving in and of making the tunnel safe, then you are instructed that the plaintiff by the acceptance of this employment assumes the ordinary risks and dangers of his employment that are known to him and those that might be known to him by the exercise of ordinary care and foresight and cannot recover."

23.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you do find from the evidence that the Katalla Company was not a common carrier when the plaintiff was injured, you are instructed that if the plaintiff was engaged in the work of making the tunnel safe, then you are instructed that the plaintiff assumed the ordinary and known dangers of the place and he cannot recover."

24.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that before you can find that the Katalla Company was at the time and place where the plaintiff was injured a common carrier, you must find from the evidence that the Katalla Company was at that time offering or holding itself out to carry goods for all persons who tendered or offered them the price of carriage, or find from the evidence that the Katalla Company was carrying goods for all persons who offered or tendered them the price for carrying same through the tunnel where plaintiff was injured.”

25.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in errors, which was [313] duly excepted to, and exception allowed.

Instruction:

“You are instructed that the plaintiff has sued both the Katalla Company and the Copper River & Northwestern Railway Company, alleging that each of them are separate corporations, and that the plaintiff was in the employ of both the Katalla Company and the Copper River & Northwestern Railway Company, therefore you are instructed that before you can find that the plaintiff was in the employ of both the Katalla Company and the Copper River & Northwestern Company, you must find from the evidence that the relation of master and servant existed between the Katalla Company and the Copper

River & Northwestern Railway Company at the time of the injury, and if you find that the relation of master and servant did not exist between the plaintiff and Katalla Company at the time of injury, then the plaintiff cannot recover against the Katalla Company, and if you find the relation of master and servant did not exist between the Copper River & Northwestern Railway Company at the time the injury happened to plaintiff, then you cannot recover against the Copper River & Northwestern Railway Company.”

26.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if the plaintiff was engaged in strengthening and retimbering the frame of the tunnel at the place where he was injured for the purpose of making the tunnel safe, or if you find that the tunnel was being repaired for making it safe and the plaintiff was injured while assisting in either the work of repairing or fixing or causing the tunnel to be fixed so as to make it safe, then you are instructed that the law does not require of the defendant to furnish either a safe nor a reasonably safe place for the plaintiff to work, and if you find that the plaintiff was injured by the necessary progress of the work in the repairing, fixing and strengthening of the tunnel, he assumed the

risks and cannot recover in this action."

27.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if the plaintiff was engaged in strengthening and retimbering the frame of the tunnel at the [314] place where he was injured for the purpose of making the tunnel safe, or if you find that the tunnel was being repaired to make it safe and the plaintiff was injured by reason of one of his co-workers taking or knocking one of the braces off and that was the cause of the falling in of the timbers and earth which injured the plaintiff, then you are instructed that the plaintiff cannot recover in this action."

28.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you find that the Katalla Company was not doing a common carrier business at the time that the plaintiff was injured, and also doing a common carrier business over that portion of the railroad line upon which the plaintiff was working and at the place

where he was injured, you are instructed that the plaintiff cannot recover in this action."

29.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that where a servant is employed to assist in repairing or opening up a tunnel which is in a bad condition and out of repair and not being used by a common carrier, the master does not owe to him the same duty to furnish a safe place as to that portion of its line out of repair and not being used as it does to his servant engaged in the operation of trains upon the roadbed in the ordinary course of business, and he is therefore subjected to greater risks and perils than he would, under ordinary circumstances, and in entering this service to perform this work he assumes the hazards incident to the work and one of the hazards is the condition of the tunnel he is engaged to repair and you are therefore instructed that if the plaintiff was injured by reason of the caving in of the tunnel because of the fact that the tunnel was in a bad condition and the plaintiff was assisting in fixing or repairing this bad condition, then you are instructed that the plaintiff cannot recover."

30.

The Court erred in failing and refusing to give to

the jury [315] the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that the plaintiff is presumed to know of dangers that he has an opportunity to observe and that he must inform himself of open, obvious risks, and if he does not do this and is injured by reason of his failure to do so, then he cannot recover.”

31.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that the plaintiff assumes the risks of all dangers that he has an opportunity to observe that are open, and that if the plaintiff accepted employment of the defendant in repairing or strengthening the tunnel for the purpose of making it safe and said tunnel was in an unsafe condition and needed repairing, that the plaintiff by accepting such employment assumed all the ordinary and usual risks and perils incident to such employment whether it was dangerous or otherwise.”

32.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that the law requires a person, when doing a dangerous piece of work, to exercise such care for his safety as an ordinary prudent man would exercise under the circumstances, and unless he exercises such care and is injured by reason of not having exercised such care, he cannot recover.”

33.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed:

Instruction:

“You are instructed that if the plaintiff had actual or constructive knowledge of danger of working at the point where the accident happened, and that a reasonably prudent man [316] under the circumstances would exercise due care to avoid danger, and the plaintiff was injured by reason of his failure to use ordinary care, he is guilty of contributory negligence and cannot recover.”

34.

The Court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if the plaintiff continued working with knowledge, actual or constructive, of dangers which an ordinary pru-

dent man would refuse or subject himself to, he is guilty of contributory negligence and cannot recover."

35.

The Court erred in denying the defendant's motion for new trial herein and in its order and judgment overruling said motions and granting judgment in favor of the plaintiff and against said defendants for the amount of the verdict found by the jury in favor of the plaintiff with costs, which order and judgment were duly excepted to by the defendants and its exception allowed by the Court; said motions were based on all the files, records and proceedings herein, and was made upon the following grounds specified therein and each thereof, to wit:

1.

"Comes now the Katalla Company by its attorney, R. J. Boryer, and moves the Court for a new trial in this case for the following reasons:

That the plaintiff admitted in his evidence that at the time he was injured he was engaged in retimbering and strengthening the tunnel because said tunnel was in an unsafe condition; that he knew it was in an unsafe condition and testified in this case that his injury was received from an accident from the caving-in of the tunnel, which cave-in was caused by the faulty construction or joinder of the caps and segments supporting the roof of the tunnel. That he was familiar with and knew of the manner in which the caps and segments were constructed or joined, and that he repeatedly noticed the con-

struction and joinder of the caps and segments, knew that they were dangerous, and, knowing these facts, admitted that he continued work without protest and admitted that he was injured by reason of the cave-in of said tunnel because [317] of the improper constructions or joinder of said caps and segments, all of which were known to him at the time of the cave-in.

2.

For the further reason that said verdict is against both the Copper River & Northwestern Railway Company and Katalla Company, and it was not shown in the evidence that the plaintiff was employed by the Copper River & Northwestern Railway Company at the time of his injury or that it was in any way connected with this defendant, Katalla Company.

3.

For the further reason that the verdict in this case is contrary to the law and instructions and evidence in the case.

4.

For the further reason that said verdict is excessive.”

“Comes now the Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, and moves the court for new trial in this case for the following reasons:

1.

That the plaintiff failed to show or prove by the preponderance of the evidence and failed in any manner to show that the plaintiff was ever

in the employ of the Copper River & Northwestern Railway Company, and failed to show that he was in the employ of the Copper River & Northwestern Railway Company at the time he received his injury.

2.

For the reason that the plaintiff has failed to show that the Katalla Company and the Copper River & Northwestern Railway Company are in any manner or way connected with each other or that the Copper River & Northwestern Railway Company or any of its agents were in any way connected with the work performed by the plaintiff at the time he was injured, and failed to show that the Copper River & Northwestern Railway Company either owned or was in any way connected with the line of road mentioned in plaintiff's complaint at the time of the injury to the plaintiff.

3.

For the further reason that the plaintiff admitted that he was familiar with the work that he was performing, knew that it was dangerous, knew of the construction of the cap and segment, which he claimed caused his injury, and knew of the danger of such cap and segment at the time he was injured and knew of, prior to his injury, the dangers that caused his injury.

4.

For the further reason that said verdict is against the law and evidence of this case.

5.

For the further reason that said verdict is excessive."

WHEREFORE, the defendants herein pray that said judgment may be reversed, vacated and set aside, and that the verdict found by the jury [318] at the close of the trial herein on which said judgment was based, may be vacated and set aside and that the Circuit Court may be ordered to dismiss said action or to award a *venire de novo* for the trial of the issues between the plaintiff and defendants herein, and for such other and further relief, or both, in the premises as may be proper.

R. J. BORYER,
Attorney for Defendants.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. July 19, 1913. E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska, 3d Division. July 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [319]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

Petition [of Copper River & N. W. Ry. Co.] for Writ of Error.

Comes now the Copper River & Northwestern Railway Company and Katalla Company, defendants herein, and complains and stated that on 5th day of May, A. D. 1913, the above-entitled court entered judgment herein in favor of the plaintiff above named, and against the defendants above named, in which judgment, and in the proceedings had prior thereto in the above-entitled cause, certain errors were committed to the prejudice of these defendants, all of which will appear in the detail from the Assignment of Errors which is filed with this petition.

WHEREFORE, these defendants pray that a writ of error issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record and proceedings, with all things concerning the same, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And defendants further pray for an order fixing the amount of bond for a supersedeas in said cause.

Dated this the 19th day of July, A. D. 1913.

R. J. BORYER,
Attorney for Defendants. [320]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, and KATALLA COM-
PANY,

Defendants.

Writ of Error [Copy].

The President of the United States of America, to
the Honorable Judge of the District Court for
the Territory and District of Alaska, Third
Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment upon a verdict, which
is in the said District Court before you, or some of
you, between Daniel S. Reeder, the original plaintiff,
and the defendant in error, and the Copper River &
Northwestern Railway Company and Katalla Com-
pany, the original defendants and plaintiffs in error,
manifest error hath happened to the damage of the
said Copper River & Northwestern Railway Com-
pany and Katalla Company, plaintiffs in error, as by
their answer appears, we being willing that error, if
any hath been, should be duly corrected and full and
speedy justice done to the parties aforesaid in this
behalf, do command you, if judgment be therein
given, that then, under your seal, distinctly and
openly, you send the record and proceedings afore-

said with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same in San Francisco, in said Circuit, on the 18 day of August, A. D. 1913, and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which [321] of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States, the 19th day of July, in the year of our Lord One Thousand Nine Hundred and Thirteen.

[Seal] ARTHUR LANG,
Clerk of the District Court for the Territory of
Alaska, Third Division.

Allowed by: FRED M. BROWN,
Presiding Judge in the District Court for the Terri-
tory and District of Alaska, Third Division.

Copy of this Writ of Error received and service
acknowledged this the 19th day of July, 1913.

J. H. COBB,
Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory
of Alaska, First Division. July 19, 1913. By E. W.
Pettit, Clerk.

Filed in the District Court, Territory of Alaska,
3rd Division. July 29, 1913. By Arthur Lang,
Clerk. By V. A. Paine, Deputy. [322]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

Writ of Error [Original].

The President of the United States of America, to
the Honorable Judge of the District Court for
the Territory and District of Alaska, Third Di-
vision, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment upon a verdict, which
is in the said District Court before you, or some of
you, between Daniel S. Reeder, the original plain-
tiff, and the defendant in error, and the Copper
River & Northwestern Railway Company and
Katalla Company, the original defendants and plain-
tiffs in error, manifest error hath happened to the
damage of the said Copper River & Northwestern
Railway Company and Katalla Company, plaintiffs
in error, as by their answer appears, we being will-
ing that error, if any hath been, should be duly cor-
rected and full and speedy justice done to the parties
aforesaid in this behalf, do command you, if judg-

ment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same in San Francisco, in said Circuit, on the 18 day of August, A. D. 1913, and that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, which [322A] of right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 19 day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal] ARTHUR LANG,
Clerk of the District Court for the Territory of
Alaska, Third Division.

Allowed by: FRED M. BROWN,
Presiding Judge in the District Court for the Territory and District of Alaska, Third Division.

Copy of this Writ of Error received and service acknowledged this the 19th day of July, 1913.

J. H. COBB,
Attorney for Defendant in Error. [322B]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 19, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska,
Third Division. Jul. 29, 1913. Arthur Lang, Clerk.
By V. A. Paine, Deputy. [322C]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

Citation [on Writ of Error—Copy].

United States of America.

The President of the United States to Daniel S.
Reeder, Greeting:

You are cited and admonished to be and appear
in the United States Circuit Court of Appeals for
the Ninth Circuit at the courtroom of said court in
the city of San Francisco, in the State of California,
within 30 days after the date of this citation, pur-
suant to writ of error filed in the clerk's office of the
District Court for the Territory of Alaska, Third
Division, wherein the Copper River & Northwest-
ern Railway Company and Katalla Company are
plaintiffs in error, and you are defendant in error,
to show cause, if any there be, why judgment in said
writ of error mentioned should not be corrected and

speedy justice not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 19th day of July, in the year of our Lord one thousand nine hundred and thirteen.

FRED M. BROWN,
Judge in the District Court for the Territory and
District of Alaska, Third Division. [323]

Copy of this Citation received and service acknowledged this the 19th day of July, A. D. 1913.

J. H. COBB,
Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. July 19, 1913. E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska, 3rd Division. July 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [324]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, and KATALLA COM-
PANY,

Defendants.

Citation [on Writ of Error—Original].

United States of America.

The President of the United States to Daniel S.
Reeder, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said Court, in the city of San Francisco, in the State of California, within 30 days after the date of this citation, pursuant to writ of error filed in the clerk's office of the District Court for the Territory of Alaska, Third Division, wherein the Copper River & Northwestern Railway Company and Katalla Company are plaintiffs in error and you are defendant in error, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, the 19th day of July, in the year of our Lord one thousand nine hundred and thirteen.

FRED M. BROWN,

Judge in the District Court for the Territory and
District of Alaska, Third Division. [324A]

Copy of this Citation received and Service
acknowledged this the 19th day of July, A. D. 1913.

J. H. COBB,

Attorney for Defendant in Error. [324B]

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 19, 1913. E. W. Pettit, Clerk. By ———, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [324C]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

**Acknowledgment of Service of Papers on Writ of
Error.**

Service of the Petition for Writ of Error, Order Allowing Writ of Error, of the Assignment of Errors, Bond on Writ of Error, of the Citation on Writ of Error, and of Writ of Error in the above-entitled cause, filed in the above-entitled court on the 19th day of July, A. D. 1913, is hereby acknowledged, and receipt of true copies thereof on this 19th day of July, A. D. 1913, is also acknowledged.

J. H. COBB,

Attorney for Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. July 19, 1913. By E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska, 3d Division. July 29, 1913. By Arthur Lang, Clerk. By V. A. Paine, Deputy. [325]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

**Order Certifying Up Papers Regarding
Supersedeas Bond.**

This matter coming on for hearing on the motion of counsel for defendant to make all of the papers filed upon the application for supersedeas bond a part of the record to be forwarded to the Appellant Court, and said motion is allowed and is hereby ORDERED that the Stipulation heretofore entered into between the attorney representing the respective parties on the 30th day of June, A. D. 1913, respecting the stay of execution, etc., until the first day of August, A. D. 1913, also the affidavit of John R. Winn, the affidavit of R. J. Boryer, and the affidavit

of J. H. Cobb and the stenographer's notes of the admission of J. H. Cobb in open court concerning the supersedeas, and any and all papers connected with said application, are hereby made a part of the record of this case, and the Clerk is ordered to certify the same up on the Writ of Error herein.

Dated this the 19th day of July, A. D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. July 19th, 1913. E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska, 3d Division. July 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [326]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

**Order to Transfer Records and Files to Third
Division.**

The motion of R. J. Boryer, attorney for defendants herein, to transfer the records and files in the

above case to the Clerk of the Court of the Third Division, at Valdez, Alaska, in which said Records and files belong.

It is hereby ORDERED that the Clerk of the Court of the First Division forward forthwith the Records and Files in the above-entitled case to the Clerk of the Court, Third Division, at Valdez, Alaska.

Dated this the 19th day of July, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, 1st Division. Jul. 19, 1913. E. W. Pettit, Clerk. By ————, Deputy.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [327]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

Order Allowing, Settling and Certifying Bill of Exceptions.

It appearing to the Court that the defendants have prepared and duly served upon the attorney for the plaintiff herein, within due time, a proposed Bill of Exceptions, and the Judge of said Court having duly designated Saturday, the 19th day of July, 1913, as the time at which he would settle the Bill of Exceptions, and both parties having been informed of the time for settling the Bill of Exceptions as designated by the Judge, and the said matter coming regularly on for hearing for the purpose of settling the said Bill of Exceptions on the 19th day of July, 1913, and attorneys for both parties having been present:

It was, thereupon, and is hereby ordered that the proposed Bill of Exceptions be allowed, the same shall be and is hereby settled and allowed as a Bill of Exceptions herein and presented to the Judge of this Court for his certificate.

And it further appearing to the Court that said proposed Bill of Exceptions conforms to the truth and is in proper form, it is therefore ordered that the said bill is a true bill of exceptions, and the same is hereby approved, allowed and settled and ordered filed and made a part of the record of said cause, and that Plaintiff's Exhibits "A" to "H," inc., and Defendant's Exhibits 1 to 6, inc., the originals be sent to United States [328] Circuit Court of Appeals, 9th Circuit, because of their character cannot be inserted in this Bill of Exceptions.

Done in open court this the 19th day of July, A.D. 1913.

FRED M. BROWN,
Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 19, 1913. E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [329]

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

COPPER RIVER & NORTHWESTERN RAIL-
WAY COMPANY and KATALLA COM-
PANY,

Defendants.

Certificate to Bill of Exceptions.

I, Fred M. Brown, Judge of the above-entitled court, do hereby certify that the above and foregoing Bill of Exceptions in the above-entitled cause is a true bill of exceptions, and the same had been approved, allowed and settled, and ordered filed and made a part of the record of said cause, and that *Plaintiff's* "A" to "H," inc., and Defendants' Exhibits 1 to 6, inc., the originals be sent to the United

States Circuit Court of Appeals, 9th Circuit, because of their character cannot be inserted in this Bill of Exceptions.

Done in open court this the 19th day of July, A. D. 1913.

FRED M. BROWN,

Judge.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jul. 19, 1913. E. W. Pettit, Clerk.

Filed in the District Court, Territory of Alaska, Third Division. Jul. 29, 1913. Arthur Lang, Clerk. By V. A. Paine, Deputy. [330]

DEFENDANTS' ORIGINAL EXHIBITS ATTACHED—" 1, 2, 3, 4, 5, and 6." [331]

[Defendants' Exhibit No. 1—Check No. A114,—
Dated Cordova, Alaska, August 14, 1911, from
Katalla Company to D. S. Reeder.]

Brass Check No. 394.

No. A114

KATALLA COMPANY.

In full payment wages month of
Jul., 1911.

Cordova, Alaska, Aug. 14, 1911.

Pay to the Order of D. S. Reeder or Bearer
\$114.80 One hundred and fourteen and 80/100 Dollars.

KATALLA COMPANY,

E. J. DAVIS,

Cashier.

S. Blum & Co.

Bankers,

Cordova, Alaska.

Countersigned: W. H. Bryant, Asst. Auditor.

[Stamped across face of check:] Pay Check. Not
Over One Hundred Twenty \$120\$. Paid Aug. 15,
1911. S. Blum & Co., Bankers, Cordova, Alaska.

[Endorsed]: D. S. Reeder.

Defendant's Exhibit 1—Cause No. C.—42.

**[Defendants' Exhibit No. 2—Check No. A12076,
Dated Cordova, Alaska, September 11, 1911,
from Katalla Company to D. S. Reeder.]**

Brass Check No. 394.

No. A12076.

KATALLA COMPANY.

In full payment wages month of
August.

Cordova, Alaska, Sep. 11, 1911.

Pay to the Order of D. S. Reeder or Bearer
\$35.50 Thirty-five 50/100 Dollars.

KATALLA COMPANY,

E. J. DAVIS,

Cashier.

S. Blum & Co.

Bankers,

Cordova, Alaska.

Countersigned: W. H. Bryant, Asst. Auditor.

[Stamped across face of check:] Pay Check. Not
Over Forty Dollars \$40\$. Paid Sep. 22, 1911. S.
Blum & Co., Bankers, Cordova, Alaska.

[Endorsed]: D. S. Reeder.

Defendant's Exhibit 2—Cause No. C.—42.

**[Defendants' Exhibit No. 3—Check No. A10366,
Dated Cordova, Alaska, July 11, 1911, from
Katalla Company to D. S. Reeder.]**

Brass Check No. C 394.

No. A10366.

KATALLA COMPANY.

In full payment wages month of
Jun., 1911.

Cordova, Alaska, Jul. 11, 1911.

Pay to the Order of D. S. Reeder or Bearer
\$103.45 One Hundred three and 45/100 Dollars.

KATALLA COMPANY,

E. J. DAVIS,

Cashier.

S. Blum & Co.

Bankers,

Cordova, Alaska.

Countersigned: W. H. Bryant, Asst. Auditor.

[Stamped across face of check:] Pay Check. Not
Over One Hundred Twenty \$120\$. Paid Aug. 15,
1911. S. Blum & Co., Bankers, Cordova, Alaska.

[Endorsed]: D. S. Reeder.

Defendant's Exhibit 3—Cause No. C.—42.

[Defendant's Exhibit No. 4—Draft No. 16604, Dated Cordova, Alaska, October 11, 1911, from Katalla Company to D. S. Reeder.]

Draft No. 16604

KATALLA COMPANY

Cordova, Alaska, Oct. 11th, 1911.

Pay to D. S. Reeder Or Order \$120.00 One hundred twenty and no/100 DOLLARS.

KATALLA COMPANY

E. J. DAVIS,

Cashier.

To ~~D. H. JARVIS, Treas.~~

S. Blum & Co.,

~~Lowman Building~~

Bankers.

~~SEATTLE, WASH.~~

Cordova, Alaska.

Countersigned: E. C. Hawkins, Chief Engineer.

[Stamped across face of draft:] Not over one hundred twenty \$120\$. Paid Oct. 11, 1911, S. Blum & Co., Bankers, Cordova, Alaska.

Do Not Alter or Detach any Part of this Voucher Draft.

Form KC 113.

Treas. No. ———

Draft No. 16604.

KATALLA COMPANY

Cordova, Alaska, Oct. 11th, 1911.

To D. S. Reeder, Payee.

Voucher No. 6414, Time allowed while in hospital, 120.00.

Charged to Audited Vouchers.

I certify that the above is a true copy of an original account, approved by the proper officer, that the same has been examined, found correct, registered and

filed in this department.

W. H. BRYANT,
Asst. Auditor.

Receipt by endorsement on back. No other receipt is necessary.

All endorsements to be made below.

This Voucher Draft is to be accepted as a full settlement of within account.

D. S. REEDER.

Defendant's Exhibit 4. Cause No. C.—42

[Defendant's Exhibit No. 5—Draft No. 16676, Dated Cordova, Alaska, November 15, 1911, from Kattalla Company to D. S. Reeder.]

Draft No. 16676

KATALLA COMPANY

Cordova, Alaska, November 15th, 1911.

Pay to D. S. Reeder Or Order \$155.00 One hundred fifty five and no/100 Dollars.

KATALLA COMPANY

E. J. DAVIS,
Cashier.

To D. H. JARVIS, Treas. S. Blum & Co.,
Lowman Building Bankers,
SEATTLE, WASH. Cordova, Alaska.

Countersigned: E. C. Hawkins, Chief Engineer.
Per Geo. Geiger.

[Stamped across face of draft:] Not over one hundred sixty \$160\$. Paid Nov. 16, 1911. S. Blum & Co., Bankers, Cordova, Alaska.

Do Not Alter or Detach any Part of this Voucher Draft.

Form KC 113.

Treas. No. ———

Draft No. 16676

KATALLA COMPANY

Cordova, Alaska, November 15th, 1911.

To D. S. Reeder, Payee.

Time allowance for month of October, 1911, 155.00.

Charged to Audited Vouchers.

I certify that the above is a true copy of an original account, approved by the proper officer, that the same has been examined, found correct, registered and filed in this department.

W. H. BRYANT,

Asst. Auditor.

Receipt by endorsement on back. No other receipt is necessary.

All endorsements to be made below.

This Voucher Draft is to be accepted as a full settlement of within account.

D. S. REEDER.

Defendant's Exhibit 5, Cause No. C.—42.

Form KC 113.

Treas. No. ———

Draft No. 16676

KATALLA COMPANY

Cordova, Alaska, November 15th, 1911.

To D. S. Reeder, Payee.

Time allowance for month of October, 1911, 155.00.

Charged to Audited Vouchers.

I certify that the above is a true copy of an original account, approved by the proper officer, that the same has been examined, found correct, registered and filed in this department.

W. H. BRYANT,

Asst. Auditor.

Receipt by endorsement on back. No other receipt is necessary.

All endorsements to be made below.

This Voucher Draft is to be accepted as a full settlement of within account.

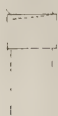
D. S. REEDER.

Defendant's Exhibit 5, Cause No. C.—42.



30

100



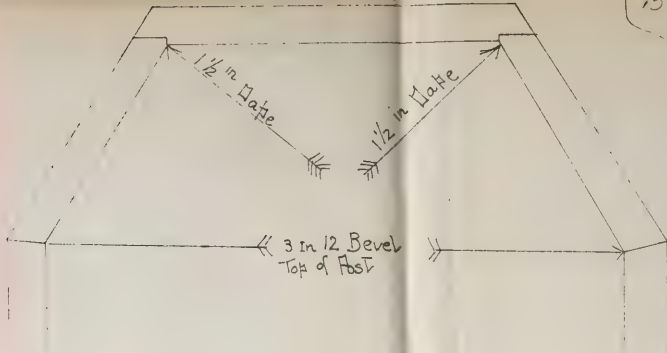
PLAINTIFFS' EXHIBIT
~~DEFENDANT'S~~

12

CAUSE NO

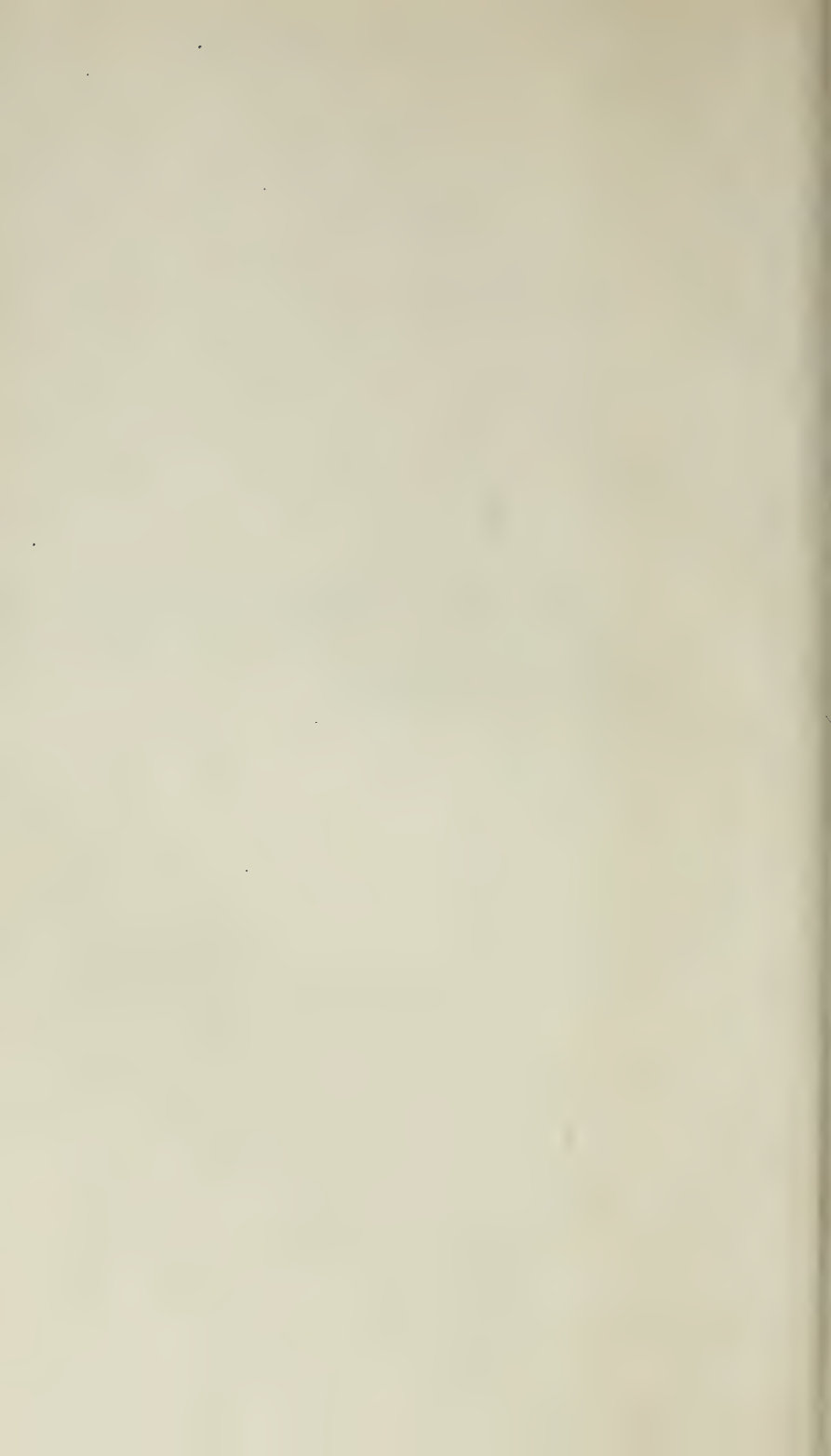
3-2

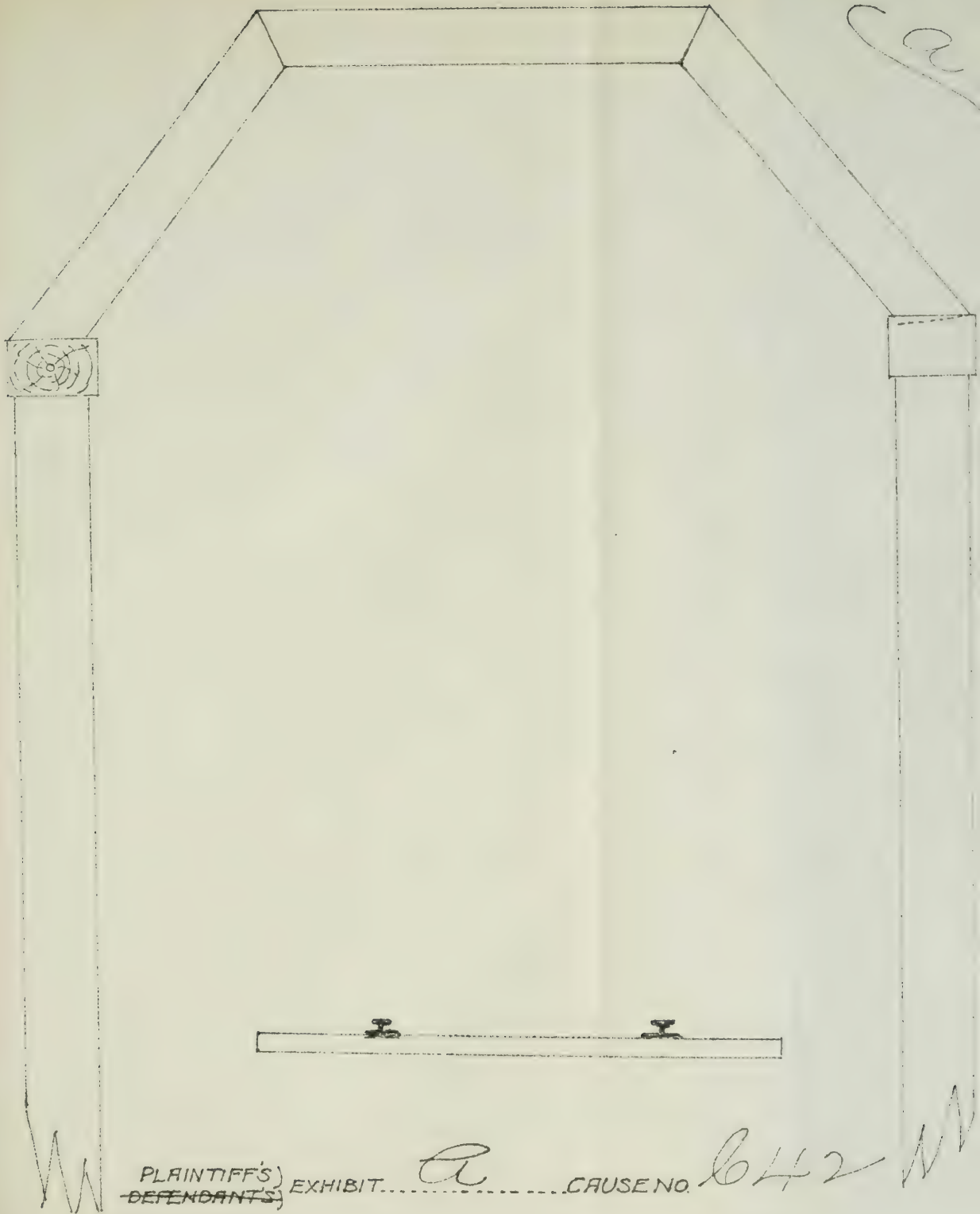
PLAINTIFF'S ORIGINAL EXHIBITS ATTACHED—"A," "B," "C," "D," "E," "F," "G" and "H." [332]

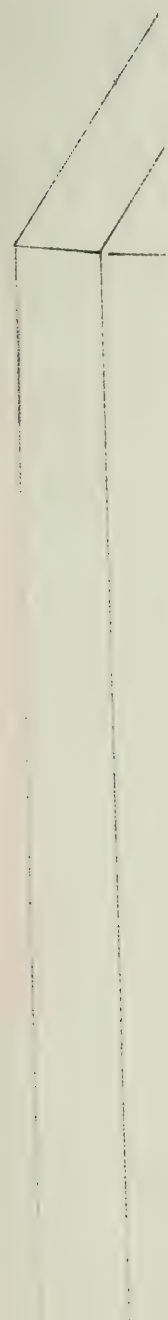


PLAINTIFFS' EXHIBIT
DEFENDANTS)

19
CAUSE No. 19







AGENCY

CONDITIONS AGREED UPON BY THE SHIPPER

1. The said property is received, and shall be held, carried and delivered by the carrier, and by all connecting carriers, and every service to be performed under this instrument shall be subject to all the stipulations and conditions hereof and of the carrier's published freight tariff, and to all the conditions, whether printed or written, in this instrument, under which stipulations rates are quoted and the property is received for transportation, and all of which are hereby agreed to by the shipper, and by him accepted for himself and assigns.

2. The steamer or steamers on which the property herein described, or any thereof, shall be forwarded, shall have leave to tow and assist scows or other vessels, to sail with or without pilots, to trans-ship to any of the carrier's steamers, or steamers employed by the carrier, to lighten from steamer to steamer, or to and from steamer and shore, to transfer to and from hulks, to ship by other carriers or conveyance the goods destined for ports or places off the route or beyond the port of discharge of said steamer, but under no circumstances shall the carrier or the vessel be held responsible for any damage to or loss of said property, or any thereof, after the same shall be unhooked from the vessel's tackle.

3. No carrier, vessel or party in possession of all or any of the property hereinbefore described, shall be liable for any loss thereof, or damage thereto, occasioned by causes beyond its or their control, or the perils of the sea, lakes, rivers or other waters, or by floods, or by fire, from any cause or whencesoever occurring; by barratry of the master or crew, by enemies, pirates, robbers, by arrest and restraint of princes, rulers of people, or any de facto authority, by riot, strikes, lockouts or stoppage of labor, by explosions, bursting of boilers, breakage of shafts, or any latent defect in hulls, machinery or appurtenances, by collisions, stranding, or any other accidents of navigation, default or error in judgment of pilot, master, mariners, or other servants of the ship owners, steamboat or other water craft transporting the whole or any part of said property, not resulting, however, in any case, from want of due diligence by the owners of the ship or other vessels, or any of them, or by the ship's husband or manager, or for any loss or damage by leakage, breakage, chafing, loss of weight, changes in weather, heat, frost, wet or decay, or from any cause when such property is being carried upon the vessel's deck or upon open cars, if it be necessary, or usual, to so carry the same.

4. No carrier or vessel shall be responsible for leakage of oils, liquors or other liquids, injury to or breakage of glass, queensware, looking glasses, show cases or picture frames, stoves, hollow-ware or other frail castings, nor for injury to or breakage of any property packed in boxes, barrels, crates or bales, when such packages do not present evidence of rough handling or improper stowage; nor for any injury to or breakage of the hidden contents of packages, or resulting from the fragile nature of the freight, or from chafing, wet or rust resulting from the imperfect or insecure packing, or insufficient coopeage, or from the result of shipping without packing, nor for loss in weight of coffee, grain or other freight packed in bags, nor for loss of weight of rice in tierces, sugar in barrels, nor for the decay of perishable articles or damage to any article arising from the effects of heat or cold, sweating or fermentation, or by reason of its own inherent vice or liability, nor for loss or damage resulting from providential causes, nor for damage to tobacco by stains to packages, or damage to cargo by vermin, burning or explosion of articles of freight, or otherwise or loss or damage on account of inaccuracy or omission in marks or description, nor for unavoidable detention or delay.

5. The carrier is not bound to carry said property, or any thereof, by any particular train or vessel, or in time to meet any particular train or vessel, or in time for any particular market-time, season, trade, business venture or enterprise or otherwise than with as reasonable dispatch as its general business will permit; and if found necessary the carrier shall have the right to carry or forward the property by any other railroad, route, steamer or vessel between the points of shipment and the point of destination.

6. The property shall be received by the consignee thereof, or connecting carrier, at the vessel's tackle immediately on arrival of the vessel at hand to receive the property as discharged, then the carrier may deliver it to a wharfinger or other party or person believed by the carrier to be responsible, and who will take charge of the property and pay freight on same, or the same may be kept on board, or landed and stored, or stored in hulks or put in lighters by carrier, at the expense and risk of the owner, shipper or consignee, and at his, or their, risk of any nature whatsoever, and further, that in case the vessel should be prevented by stress of weather, or other cause, from entering the port or place of discharge or delivery, or from discharging the whole or any part of her cargo there, the said property may, at the option of the master or agent, be conveyed upon the vessel to the nearest or other port and thence returned to port of delivery by the same, or other vessel, subject to all the provisions of this instrument in regard to the original voyage, and at the risk of the owner, shipper or consignee of said property.

7. Goods covered by this instrument may be carried on the Copper River, or any of its tributaries, the Chittina River, or any of its tributaries, including lakes, by any craft, whether operated by its own motive power, or otherwise, that is registered under the United States authority, and the words "steamer," or "vessel," when used in this instrument mean any such craft.

8. Each of the companies carrying the goods shall only be liable for loss or damage occurring on its own particular line or vessel, or its portion of the through route. The amount of any loss or damage for which any such carrier becomes liable shall be computed upon the value of the goods at the place and time of shipment, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at the point of delivery, promptly after arrival of property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier under this instrument shall be liable in any event. Any carrier, vessel or party liable on account of loss or damage to said property shall have the full benefit of any insurance that may have been effected upon or on account of said property.

9. All property shall be subject to necessary coopeage, baling, boxing or re-boxing, at owner's cost, as well as warehouse storage, customs dues, customs brokers' and bonding charges.

**[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.].**

*In the District Court for the Territory of Alaska,
Third Division.*

No. C.—42.

DANIEL S. REEDER,

Plaintiff,

vs.

KATALLA COMPANY, a Corporation, and COP-
PER RIVER & NORTHWESTERN RAIL-
WAY COMPANY, a Corporation,
Defendants.

To the Clerk of the Above Court:

You will please make, certify and transmit forth-
with to the United States Circuit Court of Appeals
for the Ninth Judicial Circuit, at San Francisco,
California, a copy of the record in the above-entitled
cause as a return to the Writ of Error heretofore
sued out of said Circuit Court of Appeals to review
the judgment in said cause, consisting of the follow-
ing files, records and proceedings in said cause:

Complaint and Summons.

Marshal's Return on Summons.

Motion to Make More Definite and Certain.

Bill of Particulars.

Minute Order to Amend.

Answer—Copper River & Northwestern Railway
Company.

Answer—Katalla Company.

Reply to Affirmative Answer of Both Defendants.

Motion for Nonsuit by Katalla Company.

Motion for Nonsuit by Copper River & Northwestern Railway Company.

Motion for Directed Verdict Katalla Company.

Motion for Directed Verdict Copper River & Northwestern Railway Company.

Verdict.

Motion for New Trial by Katalla Company.

Motion for New Trial by Copper River & Northwestern Railway Company.

Plaintiff's Request for Instructions. [333]

Defendant's Request for Instructions.

Defendants' Exceptions to Court's Instructions to Jury.

Judgment.

Minute Order Denying Motion for New Trial.

Minute Order Fixing Time to File and Present Bill of Exceptions and Stay of Execution.

Notice of Attorney's Lien.

Petition for Writ of Error.

Order Allowing Writ of Error.

Order Transferring Records to Third Division.

Order to Transmit Original Exhibits.

Order on Supersedeas Bond.

Order Staying Execution.

Affidavits in Support of Supersedeas Bond of Winn, Boryer and Cobb.

Assignment of Error.

Stipulation.

Bill of Exceptions.

Order Allowing, Settling and Certifying Bill of Exceptions.

Bond on Writ of Error.

Acknowledgment of Service of Papers on Writ of Error.

Certificate to Bill of Exceptions.

Writ of Error and Copy.

Citation and Copy.

Order Certifying Up Papers Regarding Supersedeas Bond.

This Praecipe.

R. J. BORYER,

Attorney for Defendants.

Dated August 1st, A. D. 1913.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 2, 1913. Arthur Lang, Clerk. By —————, Deputy. [334]

*In the District Court for the Territory of Alaska,
Third Division.*

United States of America,
Territory of Alaska,
Third Division,—ss.

Praecipe for Transcript [on Return to Writ of Error].

I, Arthur Lang, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the above and foregoing and hereto annexed 334 pages, numbered from 1 to 334, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above-entitled cause as the same appears on the records and files in my office; that this transcript is made in accord-

380 *Copper River & Northwestern Ry. Co. et al.*

ance with the praecipe filed in my office on the 2d day of August, A. D. 1913.

That I hereby certify that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to \$136.80, has been paid to me by R. J. Boryer, Esq., one of the attorneys for the defendants and appellants.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this 2d day of August, A. D. 1913.

[Seal]

ARTHUR LANG,

Clerk. [335]

[Endorsed]: No. 2299. United States Circuit Court of Appeals for the Ninth Circuit. Copper River & Northwestern Railway Company, a Corporation, and Katalla Company, a Corporation, Plaintiffs in Error, vs. Daniel S. Reeder, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed August 11, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COPPER RIVER & NORTHWEST-
ERN RAILWAY COMPANY, a
Corporation, and KATALLA COM-
PANY, a Corporation,

Plaintiffs in Error,

vs.

DANIEL S. REEDER,

Defendant in Error.

No. 2299

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
TERRITORY OF ALASKA
THIRD DIVISION.

Brief of Plaintiffs in Error.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT and
LAWRENCE BOGLE,

Attorneys for Plaintiffs in Error.

610 Central Building,
Seattle, Washington.

In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COPPER RIVER & NORTHWEST-
ERN RAILWAY COMPANY, a
Corporation, and KATALLA COM-
PANY, a Corporation,

Plaintiffs in Error,

vs.

DANIEL S. REEDER,

Defendant in Error.

No. 2299

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
TERRITORY OF ALASKA
THIRD DIVISION.

Brief of Plaintiffs in Error.

This cause comes here on a writ of error sued out by the defendants below to reverse a judgment rendered against the said defendants in the court below, in an action at law for the recovery of damages for personal injuries alleged to have been sustained by plaintiff (Defendant in Error), by reason of the alleged negligence of defendants. For convenience in this brief the parties will be referred to

as designated in the court below.

The complaint (R. pp. 2-4) alleges that defendants are corporations duly incorporated, and doing business as common carriers in the District of Alaska, and were engaged in such business at all times therein mentioned.

That on August 7, 1911, and for some time prior thereto, plaintiff was in the defendants' employ as a carpenter upon the line of railway running from Cordova into the interior of Alaska, and working on said day by the direction of defendants in a certain tunnel on the railway. That on said day the timbers supporting the roof of the tunnel broke and gave way, and plaintiff was caught underneath the falling timbers and seriously injured. The allegations of negligence are as follows:

“That the accident by which plaintiff was injured as aforesaid was caused by the negligent failure of the defendants to furnish the plaintiff with a reasonably safe place to work; that said place was unsafe and dangerous by reason of the negligent failure of the defendants to suitably timber and protect the workmen employed in said tunnel from the danger of cave-ins and falling of material constituting the roof of the bore of said tunnel. All of which was known to

the defendants, or by the use of reasonable diligence could have been known by them, but was unknown to the plaintiff."

The defendants answered separately. Defendant, Copper River & Northwestern Railway Company, admitted that it was a corporation doing business in Alaska as a common carrier at the time or times mentioned in the complaint, but it denied that at said time plaintiff was in its employ. It denied the other allegations of the complaint, and alleged affirmatively that if plaintiff was injured as alleged, his injuries arose out of and from risks incident to his employment and business, which he assumed; also that they were caused by the negligence of a fellow-servant, and by plaintiff's contributory negligence.

The separate answer of the defendant, Katalla Company, admitted that it was a corporation doing business in Alaska, but denied that it was doing business in Alaska as a common carrier, or that it was engaged as a common carrier at any of the times mentioned in the complaint. It admitted that plaintiff was in its employ on August 7, 1911, and had been for some time prior thereto, working as a carpenter in said tunnel. It denied the other allegations of the complaint, and alleged as affirmative

defenses, assumption of risk, contributory negligence and negligence of a fellow-servant.

The affirmative defenses in each of the answers were denied by replies.

The issues as defined by the complaint, answers and replies, came on for trial before Honorable Peter D. Overfield, Judge of said court, and a jury, on April 24, 1913. A verdict was thereafter rendered against both defendants for the sum of \$5000.00. Defendants filed separate motions for a new trial which were denied, and judgment was entered by the court on the verdict in favor of plaintiff and against both defendants (R. p. 284).

There is little dispute as to the facts in the case and no dispute as to when and how plaintiff sustained his injuries. This accident occurred August 7, 1911, in the Chitina tunnel on the railway line of the Copper River & Northwestern Railway Company which ran from Cordova to and beyond the place plaintiff was injured, all in Alaska. This railway line had been operated for some time prior to the accident in question, for the purpose of carrying freight and passengers for hire. Several months before the accident, work was commenced re-timbering the tunnel by placing new tim-

bers or bents between the old ones, which were found too weak, the other ones being left standing. Plaintiff started to work as a carpenter some time in April or May, 1911, assisting in re-timbering the tunnel (R. p. 149), and continued at this work until some time in June (R. p. 150). About July 10th, a part of the tunnel caved in (R. p. 155), and about July 16th, plaintiff started to work again in the tunnel putting in these extra timbers or bents (R. pp. 49, 156). Plaintiff and three other carpenters were doing this work of setting up new timbers. Before setting up the new timbers the old mud sills under the upright posts of the tunnel were taken out, and the earth had to be excavated so that larger mud sills could be put in (R. pp. 77, 213, 215). These new mud sills had to be put in before the new bents could be set up. About four days before the accident, the carpenters having caught up with the excavating gang, went to work around the depot near the tunnel (R. pp. 50, 71). The morning of the accident, the carpenters went into the tunnel to commence the work of setting up four new bents, which would complete the work of re-timbering the tunnel. About a week before this, a 3 by 12 brace had been nailed across the segments of the four old bents still standing. This brace

reached down to the caps on top of the upright posts, and was for the purpose of binding these segments together so that the pressure of the earth upon these segments would be distributed over all four instead of on one segment alone, and prevent them giving way under the pressure (R. pp. 80, 82, 216-218).

Before the new bents could be set up it was necessary to cut daps in the plates of the old bents, and the carpenters were sent into the tunnel this morning to cut these daps (R. pp. 51, 174). As soon as the carpenters reached the tunnel one, John Sutton, one of the four men, who with witness Likits was working on the other side of the tunnel opposite plaintiff, about fifteen feet away (R. p. 176), started to pull off this brace which was in the way of cutting these daps. Likits told Sutton to leave the brace alone, that he should see the foreman before he took it off, but Sutton answered that it would hold up any how, and proceeded to pull the brace off (R. pp. 83, 107, 110, 200). About ten minutes later the top of the tunnel over these four old bents which were being strengthened, fell in, killing Sutton and injuring the plaintiff (R. p. 108).

Some of the testimony tended to show that the pulling of the brace off these bents allowed the

pressure of the earth to fall on each segment separately, causing them to give way, permitting the top of the tunnel and earth above to cave in (R. pp. 201, 219). Other testimony tended to show that when the earth was excavated for the new mud sills, the earth which had been pressing against and holding the bevel joints of the segments and upright posts, fell down, and then there being nothing to hold these joints except the bevel, the pressure from above caused the segments to slide over the bevel of the post, and allowed the top of the tunnel to fall in (R. pp. 72, 98, 99, 123, 124, 207). There was some testimony to show that other portions of the tunnel had been braced by plaintiff and other carpenters during the work of re-timbering by putting posts in the middle of caps which had broken (R. pp. 113, 114, 156, 165, 166, 182, 206), and it was claimed and will probably be claimed here, that the failure to put such posts between these four bents was the cause of the accident. It is undisputed, however, that these four bents did not fall until after this brace was torn off, and the excavation made for the mud sills (R. pp. 88, 89, 94), and defendants offered considerable testimony which was undisputed, showing the precautions which were taken to prevent these bents giving or falling in during the progress of the work (R. pp. 212-223).

The testimony in behalf of plaintiff showed that there were plenty of timbers convenient which could have been used to protect these bents from falling, if plaintiff and those working with him in strengthening this tunnel at this place considered it unsafe (R. pp. 94, 115); and plaintiff knew just what precautions had been taken to prevent the old timbers falling, and knew what work was being done, and how it was being done, and that it was necessary to work in this manner (R. pp. 113, 124, 158, 159, 165, 168, 183, 185, 206, 221, 228). There is no evidence or claim that plaintiff ever objected either to a lack of other protection on the work that was being done, or the way it was being done, or that he ever asked that anything further be done to prevent a cave-in, or that he was promised that anything further or different would be done. Plaintiff testified that he watched the tunnel up to the time he left, "and it was considered at that time perfectly safe" (R. p. 50). He also testified that after they had excavated at the bottom of the posts, there was nothing to prevent the dirt back of the segments running down outside of the lagging, taking the strain off these segments so that the joint could slip by, but that at the time he temporarily left the tunnel four or five days before his injury, there was nothing to indicate

that it was a particularly dangerous place to him (R. p. 124). Plaintiff was an expert carpenter (R. pp. 146-149). There is nothing to show any changes in the condition of the work or the braces or guards against a cave-in, after the time plaintiff left the tunnel to go to work at the depot, until the excavating gang had gotten out the dirt so that the new mud sills could be placed in these four bents, except the work of these excavators, and on the other hand, witness Likits could not notice any changes during that time (R. pp. 204, 206). The work of putting in these four new bents could have been completed on the day of plaintiff's accident (R. pp. 209, 210).

At the close of plaintiff's evidence, each defendant moved the court for a non-suit in its favor (R. pp. 23, 25, 196). The motion of the Katalla Company was on the grounds that plaintiff had failed to establish that the Katalla Company was a common carrier at the time plaintiff was injured, or was doing a common carrier business over the railway line where plaintiff was injured; that the action was brought under the Federal Employer's Liability Act, which is in derogation of common law, and that plaintiff could not recover against the Katalla Company for failure to establish that that Company was such a common carrier. Also on the ground that the

evidence conclusively showed that plaintiff was employed in re-timbering and strengthening the tunnel for the purpose of making it safe, and that he was injured by reason of one of the hazards incident to his work, which he knew. Also that he was injured through the act of his co-laborer in knocking off the brace, and that he had failed to establish any case against the Katalla Company.

The motion of the Copper River & Northwestern Railway Company was on the grounds that plaintiff had failed to show he was in the employ of that Company at the time he received his injuries; also that he had failed to show that said Railway Company was doing a common carrier business at the time and place plaintiff was injured, and that the action was based on the Federal Employer's Liability Act; also that plaintiff was employed and engaged in re-timbering, strengthening and making an unsafe tunnel safe, which he knew, and that he was injured by reason of one of the risks incident to his work, and on the further ground that it was not shown that the Railway Company had failed or neglected to suitably timber the tunnel as alleged, and that plaintiff had failed to establish any case against that defendant.

Both of these motions were denied by the court, which stated:

“In refusing this non-suit, I would say that if Reeder had been working those last four days there—had been working along on day shift and had returned the following morning, with all the knowledge he has shown here, I would grant the non-suit, but from the very fact that he was away those four days, whether there was a burden then on the Railroad Company to have done certain work those four days, whether they did it or not, or how they did it, I believe are questions for the jury. I say that eliminating the Acts of 1906, 8 and 10.

“The motion being filed separately for each defendant, the ruling is separate as to each motion and exception allowed each defendant.”

At the close of all the evidence, each defendant moved the court for a directed verdict in its favor (R. pp. 27, 29, 232). These motions were based upon the same grounds stated in their motions for non-suit. Both motions were denied and defendants duly excepted and their exceptions were allowed.

Thereupon, the court instructed the jury as to the law in the case. Both plaintiff and defendants

requested the court to instruct the jury that the action was brought under the Federal Employer's Liability Act (R. pp. 250, 273), but the court refused to do so, not even mentioning that Act in its instructions nor the rules of law applicable to such a suit under that Act (R. pp. 232-244). After the verdict, defendant, Copper River & Northwestern Railway Company, made a separate motion for a new trial upon grounds substantially the same as those shown in its motions for a non-suit and directed verdict, and also upon the grounds that the verdict was against the law and the evidence in the case and was excessive (R. p. 279).

Defendant, Katalla Company, also made a motion for a new trial upon substantially the same grounds (R. p. 281).

Both of these motions were denied, to which ruling defendants excepted and their exceptions were allowed.

The questions involved in this statement of facts and presented here by the Assignments of Error, together with the manner in which these questions are raised upon the record, are as follows:

I.

Plaintiffs in Error contend that as this action was brought under the Federal Employer's Liability Act, and as it is alleged and admitted that defendant, Copper River & Northwestern Railway Company, was a common carrier by railway in a territory, and as it appears that plaintiff was injured while employed on this railway line which had been used in the transportation of freight and passengers for hire, plaintiff could only recover against the Copper River & Northwestern Railway Company by proof that he was in the employ of that Company, and that the evidence wholly fails to show such employment.

That there was no evidence in the case to show that the Katalla Company was a common carrier by railway in Alaska, as alleged, and therefore that no recovery could be had against it under the Federal Act. That as the suit was based on the Federal Act and was a joint action against both defendants, and recovery could be had against the defendant Railway Company only under the Federal Act, and against the Katalla Company only under the common law, therefore the two actions could not be joined. That plaintiff could not sue both defendants jointly relying on both the common law and the

statute; that the joint judgment cannot stand under the pleadings and evidence in the case, and that the court erred in not holding as a matter of law under the pleadings and evidence, that the action must be dismissed as to one defendant or the other in any event.

These questions are raised on the record by Assignments of Error Nos. 8, 9, 25, 28, 35.

II.

Plaintiffs in Error contend that the evidence wholly fails to show any cause of action or right to recover against either defendant, for the further reasons:

(a) No right to recover against the Copper River & Northwestern Railway Company is shown because

1. Plaintiff did not show he was in the employ of that Company.

2. Plaintiff could only maintain the action against that Company under the Federal Act.

3. The evidence fails to show any negligence on the part of the Railway Company, either under the common law or the statute.

4. That the evidence shows as a matter of law that plaintiff assumed the risks involved in his employment and cannot recover either under the common law or the statute.

(b) No right to recover against the Katalla Company is shown because

1. It is alleged and admitted that plaintiff was in the employ of the Katalla Company at the time of his injury, and the action being a joint action against two defendants, based on the Federal statute, no recovery could be had against the Katalla Company without proof that it was a common carrier by railway within the Federal statute at the time of plaintiff's injury, and no sufficient proof of that fact was made.

2. The evidence fails to show any negligence on the part of the Katalla Company, either under the common law or the Federal statute.

3. The evidence does show as a matter of law that plaintiff assumed all risks involved in his employment, and cannot recover either under the common law or the statute.

These questions are raised on the record by the following Assignments of Error: 8, 9, 10, 13, 14, 16-24, 26-35.

III.

Plaintiffs in Error contend that the trial court committed numerous errors in the trial of the case in the admission of evidence and in giving and refusing to give instructions to the jury, which errors were highly prejudicial to both defendants, and because of which the judgment of the trial court should be reversed and a new trial granted in any event.

These questions are raised upon the record by the following Assignments of Error: 5, 6, 7, 11, 12, 28.

SPECIFICATIONS OF ERROR RELIED
UPON.

5.

The court erred in permitting plaintiff to introduce Exhibits "C" and "D" and evidence regarding the Bill of Ladings, and in overruling the objection of plaintiff in error to said testimony, to which ruling plaintiffs in error duly excepted and exception allowed. The proceedings being as follows:

Q. "I will ask you to examine a Bill of Lading that appears to be made out to you,

made out to McDonald & Reidy—that is one of the bills of lading made out to your firm.”

A. “Yes, sir.”

Q. “Did you do quite a good deal of shipping in 1910 and 1911?”

A. “We did considerable.”

Q. “Is that a specimen of the sort of bills of lading you got?”

A. “Yes, sir.”

MR. COBB: “I offer this in evidence.”

MR. BORYER: “I object to it for the reason that it is a Bill of Lading that purports to carry goods from Cordova to Miles Glacier, when this accident happened at Mile 131, some eighty miles beyond, a destination named in the bill of lading.”

MR. COBB: “It is over a portion of the same road.”

MR. BORYER: “I think not.”

BY THE COURT: “If you connect it up it will be all right.”

Q. “These goods were over the Copper River Railway?”

A. "Yes, sir."

BY THE COURT: "It may go for what it shows, showing that shipments to Miles Glacier."

MR. BORYER: "The reason I made that statement—because this road has been under construction. There were portions of this road that was constructed and trains were run over that portion of it. There were other portions that were not constructed, that is, it was partially constructed, temporary tracks were laid down but there was no hauling over the other portion of the road. There were licenses that were issued which is available to the plaintiff and issued for only a portion of the road and did not extend beyond certain points."

BY THE COURT: "The objection is overruled; as far as the admission of this particular offer is concerned, it may be admitted for the purpose indicated by the court."

MR. COBB: "And one of the purposes is to show that the Katalla Company during the year 1911 was carrying on the business of common carrier by rail and was the railroad company."

MR. BORYER: "I wish to make the further objection, for the reason that the bill of lading does not purport to be a bill of lading of the date that the accident happened to the plaintiff."

BY THE COURT: "What is the date of it?"

MR. COBB: "May 4, 1911."

BY THE COURT: "Proceed—it may be admitted."

Defendant allowed an exception.

The Bill of Lading is marked Plaintiff's Exhibit "C" and read to the jury by Mr. Cobb.

Q. "You say you received a great many bills of lading of which that is a specimen?"

A. "Yes, sir."

Q. "Did you receive that bill of lading also, for goods shipped?" (Hands witness paper.)

A. "Yes, sir."

MR. COBB: "We offer that in evidence also in connection with the witness' testimony."

MR. BORYER: "We object to it for the reason that the receipt or paper purports to be a paper with its destination at Miles Glacier, Mile

49, and for the further reason that it bears the date of May 8—What date is that, Mr. Reidy?”

THE WITNESS: “May 3d.”

MR. BORYER: “For the further reason that the bill of lading shows, or the paper, that it was issued on May 3, 1911, and is irrelevant and immaterial.”

Objection overruled. Defendant allowed an exception. It is admitted as Plaintiff's Exhibit “D.”

MR. COBB: “That is all.”

6.

The court erred in permitting plaintiff to introduce Exhibits “E” and “F” and evidence regarding the Bill of Lading and in overruling the objection of plaintiff in error to said testimony, to which ruling plaintiff in error duly excepted and exception was allowed. The proceedings being as follows:

Q. “I hand you a bill of lading dated August 16, 1911, purporting to be dated Cordova, Alaska, and issued to O. M. Kinney and ask you if you ever saw that before.”

A. “Yes, sir.”

Q. “Was that issued to you?”

A. "Yes, sir."

Q. "And the goods shipped out on the line of the road?"

A. "Yes, sir."

MR. COBB: "We offer that in evidence."

MR. BORYER: "We object to it for the reason that it is not the proper way of showing that the Defendant, Katalla Company, was a common carrier; for the further reason that the bill of lading shows that it was issued on the 16th day of August, 1910, and for the further reason that the goods were consigned to a point this side of the point where the accident happened."

Objection overruled. Defendant allowed an exception. It is marked Plaintiff's Exhibit "E" and admitted in evidence.

MR. COBB: "I am going to offer this one in evidence, of the same date."

Same objection; same ruling. Defendant allowed an exception. It is marked Plaintiff's Exhibit "F" and admitted in evidence.

Q. "That was issued to you, was it, in the due course of business?"

A. "Yes, sir."

MR. BORYER: "I take it my exception goes to all this evidence."

BY THE COURT: "Yes, sir."

Q. "I offer you some dated along in March, 1910, and ask you if that was issued to you?"

A. "No, sir."

Q. "Did you ship any goods out in 1911?"

A. "I think I did; yes."

Q. "Did you get the same kind of bill of lading, from the Katalla Company, operating the Copper River & Northwestern Railway?"

A. "I don't remember now—I shipped from the time the road started. I couldn't tell you what kind of bill of lading I got."

Q. "You have seen a great many of these Katalla Company bills of lading issued here?"

A. "Yes, sir."

MR. COBB: "That is all."

7.

The court erred in permitting plaintiff to introduce in evidence Bills of Lading marked Exhibits

“G” and “H” and in overruling the objection of plaintiffs in error to said exhibits, to which ruling plaintiffs in error excepted and exception was allowed. The proceedings were as follows:

Q. (MR. COBB): “Did you have occasion during the year 1911 to ship any goods out over the line of the Copper River & Northwestern Railway?”

A. “Not under the Northwestern Hardware Co.’s firm name—the firm’s name was Feldman and Gerber in 1911—the firm name changed.”

Q. “I will ask you if you ever saw this before (handing witness paper).”

A. “Yes, sir.”

Q. “Were these bills of lading issued for shipments on the Copper River & Northwestern Railroad?”

A. “Yes, sir.”

Q. “Examine both of them.”

A. “Yes, sir.”

Q. “Freight paid on them?”

A. “Yes, sir.”

MR. COBB: “We offer these in evidence.”

BY THE COURT: "They will be admitted and appropriated marked."

MR. BORYER: "We ask for an exception to the ruling. Exception allowed." (They are marked Exhibits "G" and ".H")

8.

The court erred in denying the motion made by the plaintiffs in error at the close of the testimony for a non-suit of said action as to both defendants, to which each defendant excepted and exception was allowed. The motions were as follows:

"Comes now the defendant, the Katalla Company, by its attorney, R. J. Boryer, and moves the court to grant a non-suit to this defendant, for the reasons:

1.

That the plaintiff has closed his case and has failed to establish that the Katalla Company was a common carrier at the time that the plaintiff was injured, and failed to establish that the Katalla Company was doing a common carrier business over the line and at the place where the plaintiff was injured.

2.

That this action is brought under the Federal Employer's Liability Acts of 1906, 1908 and 1910, which is in derogation of the common law, and having failed to establish that the Katalla Company was doing a common carrier business at the time of the injury, to plaintiff and over the line at the point where the plaintiff was injured, cannot recover at common law in this action.

3.

For the further reason that the evidence in the case introduced by the plaintiff conclusively shows that the plaintiff was employed in retimbering and strengthening of the tunnel upon which he was working, for the purpose of making said tunnel safe, and that he was injured by reason of one of the hazards incident to his work which he knew while working on said tunnel.

4.

For the further reason that the evidence shows that the plaintiff was a co-laborer and a fellow-servant of the laborer who knocked the brace off of the frame-work of the tunnel, and that the knocking off of the brace in said tunnel

was the cause of the cave-in which injured the plaintiff.

5.

For the further reason that the plaintiff has failed to establish his case."

"Comes now the defendant, the Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, and moves the court to grant a non-suit to this defendant, for the reasons:

1.

That the plaintiff has closed his case and has failed to show that the plaintiff was employed by the Copper River & Northwestern Railway Company, and has failed to show that the plaintiff was in the employ of the Copper River & Northwestern Railway Company at the time that he received his injury complained of in this action.

2.

For the further reason that the plaintiff has failed to show that the defendant, Copper River & Northwestern Railway Company, was doing a common carrier business at the time the plain-

tiff was injured as alleged in his complaint, and for the further reason that the plaintiff has failed to show that the Copper River & Northwestern Railway Company was doing a common carrier business over the line at the place where the plaintiff received his injury, and for the further reason that this action is based upon the Federal Employer's Liability Act as passed by Congress of United States in 1906, 1908 and 1910, which Act precludes a recovering at common law.

3.

For the further reason that the evidence shows that the plaintiff was employed at and was engaged in retimbering, strengthening and making an unsafe tunnel safe, which facts were admitted by the plaintiff to be known by him prior to the happening of his injury and was injured by reason by one of the risks incident to his work.

4.

For the further reason that the plaintiff has failed to show that this defendant failed and neglected to suitably timber the said tunnel so as to protect the workmen, by using old and

weaken timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon.

5.

For the further reason that the plaintiff has failed to establish his case against this defendant."

9.

The court erred in refusing to direct a verdict as to each and both of the defendants' motions for a directed verdict, to which defendants excepted and exception was allowed. The proceedings were as follows:

BY THE COURT: "The motions are denied in each case and exception allowed. I have these two questions in my mind that I will instruct the jury on, and it may be that I will have occasion to instruct the jury that there is not sufficient evidence for the defendants to be held as common carriers—I don't know about that."

"Comes now the Katalla Company, by its attorney, R. J. Boryer, and moves the court for a directed verdict in this action for the reasons:

1.

That the plaintiff has closed his case and has failed to establish that the Katalla Company was a common carrier at the time that the plaintiff was injured, and failed to establish that the Katalla Company was doing a common carrier business over the line and at the place where the plaintiff was injured.

2.

That this action is brought under the Federal Employer's Liability Acts of 1906, 1908 and 1910, which is in derogation of the common law, and having failed to establish that the Katalla Company was doing a common carrier business at the time of the injury to plaintiff and over the line at the point at which the plaintiff was injured, cannot recover at common law in this action.

3.

For the further reason that the evidence in the case introduced by the plaintiff conclusively shows that the plaintiff was employed in retimbering and strengthening the tunnel upon which he was working for the purpose of making said tunnel safe, and that he was injured by reason

of one of the hazards incident to his work which he knew while working on said tunnel.

4.

For the further reason that the evidence shows that the plaintiff was a co-laborer with and a fellow-servant of the laborer who knocked the brace off of the frame-work of the tunnel, and that the knocking off of the brace in said tunnel was the cause of the cave-in which injured the plaintiff.

5.

For the further reason that the plaintiff has failed to establish his case.

6.

For the further reason that the plaintiff has admitted that he was familiar with and knew all of the dangers incident to his work and by which he was injured."

"Comes now the Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, and moves the court for a directed verdict in this action for the reasons:

1.

That the plaintiff has closed his case and has failed to show that the plaintiff was employed by the Copper River & Northwestern Railway Company, and has failed to show that the plaintiff was in the employ of the Copper River & Northwestern Railway Company at the time that he received his injury complained of in this action.

2.

For the further reason that the plaintiff has failed to show that the defendant Copper River & Northwestern Railway Company was doing a common carrier business at the time the plaintiff was injured as alleged in his complaint, and for the further reason that the plaintiff has failed to show that the Copper River & Northwestern Railway Company was doing a common carrier business over the line and at the place where the plaintiff received his injury, and for the further reason that this action is based upon the Federal Employer's Liability Acts as passed by Congress of the United States in 1906, 1908 and 1910, which acts preclude a recovering at common law.

3.

For the further reason that the evidence shows the plaintiff was employed at and was engaged in retimbering, strengthening and making an unsafe tunnel safe, which facts were admitted by the plaintiff to be known by him prior to the happening of his injury, and was injured by reason of the risks incident to his work.

4.

For the further reason that the plaintiff has failed to show that this defendant failed and neglected to suitably timber the said tunnel so as to protect the workmen, by using old and *weaken* timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon.

5.

For the further reason that the plaintiff has failed to establish his case against this defendant.

6.

For the further reason that the plaintiff has admitted that he was familiar with and knew all

of the dangers incident to his work and by which he was injured."

10.

The court erred in giving the following instruction during the course of the charge to the jury, to which instruction the plaintiffs in error duly excepted and exception was allowed:

Instruction *excepted* to:

"You are first instructed that an employer of labor is obliged and bound to furnish a reasonably safe place in view of the circumstances of the labor or the work to be done, the surrounding circumstances, and maintain it as a reasonably safe place for the employees to work in."

11.

The court erred in giving the following instruction during the course of the charge to the jury, to which instruction the plaintiffs in error duly excepted and exception was allowed.

Instruction *excepted* to:

"Taking those two broad principles of law, your duty then will be to decide in this case, what was the cause of Mr. Reeder's injury,

about which there is no doubt or no contention—that is, the extent of the injury or accident may be a question for you,—what was the real, proximate cause of his injury.”

12.

The court erred in giving the following instruction during the course of the charge to the jury, to which instruction the plaintiffs in error duly excepted and their exception was allowed.

Instruction excepted to:

“In my opinion law is common sense. We may differ sometimes as to what is common sense, the broad term,—so sometimes we may differ as to the law. Since I believe it to be founded on common sense, I am going to try to take you along with me in the reasoning of the law, as well as giving you the law in this case.”

13.

The court erred in giving the following instruction during the course of the charge to the jury, to which instruction the plaintiffs in error duly excepted and their exception was allowed.

Instruction excepted to:

“It has been, it seems to me justly, held that if the proximate cause of an injury such

as this, was on the part of the employer of the labor, that the employer is liable. It has been held upon the other hand, that if the proximate cause of the injury was upon the plaintiff himself, Mr. Reeder in this case, or upon one of his fellow-workmen who were working with him, and through no fault of the defendants, then he could not recover. To illustrate what the law believe to be correct and what is common sense, I will give you two illustrations, founded upon two cases.

Imagine, if you will, that two men are working at this table, one facing this way and one this way and two men similarly working at that table over there, say upon tin or iron plate ware. One of the workmen would be standing with his back to an alleyway 10 or 12 feet wide and the other facing it. That it was the duty of those employed to stand here and do their work and perform their duties. While he was so working, two other men from some other part of the same room came along with a truck, we will say, a four-wheeled low-truck, with an ordinary handle, with a cross-piece at the end, that you see upon trucks around railroad freight stations outside, where the wheel works very

easily under the first axle. And while they were coming in with a load of tinware that was used upon the table in the ordinary course of business, one of the wheels, we will say, dropped into a little hole in the floor, a hole sufficient, a hole sufficiently large with *with* the load upon it to stop the truck for a moment, and the man at the tongue handle, or whatever you may call the steering apparatus by which he was pulling, kinder wiggled it as a man naturally would, attempting to pull the load from the hole, with the other man pushing behind the load. That while he was so wiggling and pulling and the other pushing to get it from the hole, a lot of tin or iron ware fell off the truck and injured this first man standing here with his back to that board and to that hole in the floor.

Now, in that case, although the plaintiff there and the boy or man standing here might have known of the hole, it is the law and was so held that even though he knew that, he did not as a part of his employment there have a right to assume or anticipate that he might be injured in the way he was by reason of that hole. That by reason of that hole being in the floor it was the duty upon the employer of these

men in that room to have remedied that hole and that, although probably the wiggling of the tongue on that load at that particular time caused the tinware to slip off the truck, the real cause, the proximate cause of that injury, was the defect in the floor.

The case of the opposite result, in which the actions of a fellow workman exonerated an employer of labor from an injury was that in which a common derrick was used, which consists, as you all know, I presume, of a boom and a mast, the mast being the upright piece and the boom goes off at an angle. In that instance men were employed to erect the boom and mast and when they were about completed, the base, which would probably be a long piece of wood, depending of course upon the size, length, etc., of the derrick, probably we will say the length of that rug and in dimensions proportionate to hold the load it was calculated to hold—that piece of wood had been placed in position and holes bored, through which iron bolts of sufficient size were to be put and the nuts screwed down, of course, to hold it in position. For some reason, either the bolts had been mislaid or had not been completed or something, on the completion of the work on a certain day, they walked away without putting those bolts in;

that was to be left to be completed on a subsequent day but before the derrick was to be used.

Now, it happened that the engineer who had control of the machinery running that derrick knew that, as well as the foreman and the man who was injured. The next day the foreman, who was a fellow-servant to the injured man, ordered an attachment to be made to a piece of stone and the engines to be started and the stone lifted by that derrick. The first pull did not succeed in lifting the stone. The foreman told him to go ahead and lift it; anyhow he made another pull and of course the bottom of the derrick, not being fast upon the resting piece as it should have been, it very naturally buckled out and gave way at the bottom and the boom of the derrick hit the plaintiff and injured him.

Now, the company in that case was held not liable because they claimed that the proximate cause in that case was the negligence of the foreman who knew that the bolts were not put in there and the company had done all they could to prevent them going ahead and using that derrick until it was fixed. That that was a risk that the company could not in reason have

apprehended would happen. They expected that the men would do what their good common sense would tell them to do and they had no right under those circumstances to anticipate that a man would so far forget and fail to do his duty as to start up and use a derrick before the bottom was fastened, and the man in charge in the erection of the derrick had ordered them not to so use the derrick.”

14.

The court erred in failing and refusing to give to the jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that the plaintiff alleges in his complaint that the defendants’ negligent acts consisted in the failure of the defendants to suitably timber and protect the workmen employed in said tunnel from the dangers of cave-in and falling of material constituting the roof of the bore of said tunnel, and said negligent acts consisted in the fact that the defendants failed and neglected to suitably timber said tunnel so as to protect the workmen by

using old and *weaken* timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made, so as to support the weight which would necessarily be imposed thereon; therefore you are instructed that before the plaintiff can recover in this case he must establish by the preponderance of the evidence that the injury to plaintiff was caused by the defendants using old and *weaken* timbers and timbers of insufficient size and strength to have the construction of the roof of said tunnel properly made so as to support the weight which would necessarily be imposed thereon."

16.

The court erred in failing and refusing to give to the jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you find that the Katalla Company was at the time of the injury to the plaintiff doing a common carrier business at the point or place where plaintiff was injured, and that the plaintiff was working

for the Katalla Company, which work or employment consisted in repairing the tunnel or making the tunnel safe because it was in a dangerous condition, and the plaintiff knew it was in a dangerous condition, then you are instructed that the plaintiff assumed the ordinary risks and dangers of his employment that were known to him and those that might be known to him by the exercise of ordinary care and foresight and he cannot recover in this case."

17.

The court erred in failing and refusing to give to the jury the following instruction requested by plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if the plaintiff was engaged in repairing or strengthening or retimbering the tunnel that was in an unsafe condition and he failed along with his co-laborers to take precautions in bracing the timbers and the tunnel caved in by reason of the fact that the plaintiff along with his co-laborers failed or neglected to brace the timbers or failed to take any steps to prevent the cave-in while

they were working and the defendant had suitable timbers convenient which the plaintiff could have used to strengthen the timbers in the tunnel and prop the tunnel, and failed to do so, then you are instructed that the plaintiff cannot recover in this case."

18.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you find from the evidence that the plaintiff's injury was caused by reason of the negligence of a co-worker or fellow-servant of the plaintiff that he cannot recover in this action."

19.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you find from the evidence that the Katalla Company was

doing a common carrier business at the time and through the tunnel where plaintiff received his injuries, and the plaintiff was engaged in and of making the tunnel safe by timbering said tunnel, or by strengthening the timbers of said tunnel, then you are instructed that the plaintiff by the acceptance of this employment assumes the ordinary risks and dangers of his employment that are known to him and those that might be known to him by the exercise of ordinary care and foresight and he cannot recover in this action."

20.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that if you find from the evidence that the Katalla Company was not a common carrier at the time and place of the accident to plaintiff and that the plaintiff was engaged in work of making the tunnel safe to prevent caving in and falling of earth by timbering said tunnel or by replacing and strength-

ening the timbers of the tunnel, and while employed in this work he received his injury, you are instructed that the plaintiff assumes the hazards incident to such work and he cannot recover.”

21.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if you find from the evidence that the Katalla Company was not a common carrier at the time and place where plaintiff was injured, and that the plaintiff was employed by the Katalla Company and was engaged in the repair of the tunnel that was unsafe, you are instructed that by the plaintiff accepting this employment he assumes the hazards incident to such work and cannot recover in this case.”

22.

The court erred in failing and refusing to give to the jury the following instruction requested by

the plaintiff in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if you find from the evidence that the Katalla Company was not doing a common carrier business at the time and place where plaintiff received his injuries and the plaintiff was engaged in the repair of the tunnel to keep the dirt and earth from caving in and of making the tunnel safe, then you are instructed that the plaintiff by the acceptance of this employment assumes the ordinary risks and dangers of his employment that are known to him and those that might be known to him by the exercise of ordinary care and foresight and cannot recover.”

23.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if you do find from the evidence that the Katalla Company

was not a common carrier when the plaintiff was injured, you are instructed that if the plaintiff was engaged in the work of making the tunnel safe, then you are instructed that the plaintiff assumed the ordinary and known dangers of the place and he cannot recover."

24.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that before you can find that the Katalla Company was at the time and place where the plaintiff was injured a common carrier, you must find from the evidence that the Katalla Company was at that time offering or holding itself out to carry goods for all persons who tendered or offered them the price of carriage, or find from the evidence that the Katalla Company was carrying goods for all persons who offered or tendered them the price for carrying same through the tunnel where plaintiff was injured."

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that the plaintiff has sued both the Katalla Company and the Copper River & Northwestern Railway Company, alleging that each of them are separate corporations, and that the plaintiff was in the employ of both the Katalla Company and the Copper River & Northwestern Railway Company, therefore you are instructed that before you can find that the plaintiff was in the employ of both the Katalla Company and the Copper River & Northwestern Company, you must find from the evidence that the relation of master and servant existed between the Katalla Company and the Copper River & Northwestern Railway Company at the time of the injury, and if you find that the relation of master and servant did not exist between the plaintiff and Katalla Company at the time of injury, then the plaintiff cannot recover against the Katalla Company,

and if you find the relation of master and servant did not exist between the Copper River & Northwestern Railway Company at the time the injury happened to plaintiff, then you cannot recover against the Copper River & Northwestern Railway Company."

26.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

• Instruction:

"You are instructed that if the plaintiff was engaged in strengthening and retimbering the frame of the tunnel at the place where he was injured for the purpose of making the tunnel safe, or if you find that the tunnel was being repaired for making it safe and the plaintiff was injured while assisting in either the work of repairing or fixing or causing the tunnel to be fixed so as to make it safe, then you are instructed that the law does not require of the defendant to furnish either a safe nor a reasonably safe place for the plaintiff to work, and if you find that the plaintiff was injured by the

necessary progress of the work in the repairing, fixing and strengthening of the tunnel, he assumed the risks and cannot recover in this action.”

27.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction :

“You are instructed that if the plaintiff was engaged in strengthening and retimbering the frame of the tunnel at the place where he was injured for the purpose of making the tunnel safe, or if you find that the tunnel was being repaired to make it safe and the plaintiff was injured by reason of one of his co-workers taking or knocking one of the braces off and that was the cause of the falling in of the timbers and earth which injured the plaintiff, then you are instructed that the plaintiff cannot recover in this action.”

28.

The court erred in failing and refusing to give to the jury the following instruction requested by

the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if you find that the Katalla Company was not doing a common carrier business at the time that the plaintiff was injured, and also doing a common carrier business over that portion of the railroad line upon which the plaintiff was working and at the place where he was injured, you are instructed that the plaintiff cannot recover in this action.”

29.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that where a servant is employed to assist in repairing or opening up a tunnel which is in a bad condition and out of repair and not being used by a common carrier, the master does not owe to him the same duty to furnish a safe place as to that portion of its line out of repair and not being used as it does

to his servant engaged in the operation of trains upon the roadbed in the ordinary course of business, and he is therefore subjected to greater risks and perils than he would, under ordinary circumstances, and in entering this service to perform this work he assumes the hazards incident to the work and one of the hazards is the condition of the tunnel he is engaged to repair and you are therefore instructed that if the plaintiff was injured by reason of the caving in of the tunnel because of the fact that the tunnel was in a bad condition and the plaintiff was assisting in fixing or repairing this bad condition, then you are instructed that the plaintiff cannot recover."

30.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that the plaintiff is presumed to know of dangers that he has an opportunity to observe and that he must inform himself of open, obvious risks, and if he does

not do this and is injured by reason of his failure to do so, then he cannot recover."

31.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

"You are instructed that the plaintiff assumes the risks of all dangers that he has an opportunity to observe that are open, and that if the plaintiff accepted employment of the defendant in repairing or strengthening the tunnel for the purpose of making it safe and said tunnel was in an unsafe condition and needed repairing, that the plaintiff by accepting such employment assumed all the ordinary and usual risks and perils incident to such employment whether it was dangerous or otherwise."

32.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that the law requires a person, when doing a dangerous piece of work, to exercise such care for his safety as an ordinary prudent man would exercise under the circumstances, and unless he exercises such care and is injured by reason of not having exercised such care, he cannot recover.”

33.

The court erred in failing and refusing to give to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if the plaintiff had actual or constructive knowledge of danger of working at the point where the accident happened, and that a reasonably prudent man under the circumstances would exercise due care to avoid danger, and the plaintiff was injured by reason of his failure to use ordinary care, he is guilty of contributory negligence and cannot recover.”

34.

The court erred in failing and refusing to give

to the jury the following instruction requested by the plaintiffs in error, which was duly excepted to, and exception allowed.

Instruction:

“You are instructed that if the plaintiff continued working with knowledge, actual or constructive, of dangers which an ordinary prudent man would refuse to subject himself to, he is guilty of contributory negligence and cannot recover.”

35.

The court erred in denying the defendant's motion for new trial herein and in its order and judgment overruling said motions and granting judgment in favor of the plaintiff and against said defendants for the amount of the verdict found by the jury in favor of the plaintiff with costs, which order and judgment were duly excepted to by the defendants and exception allowed by the court; said motions were based on all the files, records and proceedings herein, and were made upon the following grounds specified therein and each thereof, to-wit:

1.

“Comes now the Katalla Company by its

attorney, R. J. Boryer, and moves the court for a new trial in this case for the following reasons:

That the plaintiff admitted in his evidence that at the time he was injured he was engaged in retimbering and strengthening the tunnel because said tunnel was in an unsafe condition; that he knew it was in an unsafe condition and testified in this case that his injury was received from an accident from the caving-in of the tunnel, which cave-in was caused by the faulty construction or joinder of the caps and segments supporting the roof of the tunnel. That he was familiar with and knew of the manner in which the caps and segments were constructed or joined, and that he repeatedly noticed the construction and joinder of the caps and segments, knew that they were dangerous, and, knowing these facts, admitted that he continued work without protest and admitted that he was injured by reason of the cave-in of said tunnel because of the improper constructions or joinder of said caps and segments, all of which were known to him at the time of the cave-in.

2.

For the further reason that said verdict is

against both the Copper River & Northwestern Railway Company and Katalla Company, and it was not shown in the evidence that the plaintiff was employed by the Copper River & Northwestern Railway Company at the time of his injury or that it was in any way connected with this defendant, Katalla Company.

3.

For the further reason that the verdict in this case is contrary to the law and instructions and evidence in the case.

4.

For the further reason that said verdict is excessive."

"Comes now the Copper River & Northwestern Railway Company, by its attorney, R. J. Boryer, and moves the court for new trial in this case for the following reasons:

1.

That the plaintiff failed to show or prove by the preponderance of the evidence and failed in any manner to show that the plaintiff was ever in the employ of the Copper River & Northwestern Railway Company, and failed to show

that he was in the employ of the Copper River & Northwestern Railway Company at the time he received his injury.

2.

For the reason that the plaintiff has failed to show that the Katalla Company and the Copper River & Northwestern Railway Company are in any manner or way connected with each other or that the Copper River & Northwestern Railway Company or any of its agents were in any way connected with the work performed by the plaintiff at the time he was injured, and failed to show that the Copper River & Northwestern Railway Company either owned or was in any way connected with the line of road mentioned in plaintiff's complaint at the time of the injury to the plaintiff.

3.

For the further reason that the plaintiff admitted that he was familiar with the work that he was performing, knew that it was dangerous, knew of the construction of the cap and segment, which he claimed caused his injury, and knew of the danger of such cap and segment at the time he was injured and knew of, prior

to his injury, the dangers that caused his injury.

4.

For the further reason that said verdict is against the law and evidence of this case.

5.

For the further reason that said verdict is excessive.”

ARGUMENT.

THIS JOINT ACTION CANNOT BE MAINTAINED.

This action is based upon the Federal Employers' Liability Act. It could not be maintained against either defendant based upon both the statute and common law. If the Act applies to either defendant, it "supersedes all other common law and statutory liability on the part of such common carriers to such employees."

De Aitley vs. C. & O. R. Co., 201 Fed. 591.

See also:

Kelley's Administrator vs. C. & O. R. Co. et al., 201 Fed. 620;

Michigan Central R. Co. vs. Vreeland, 45 Sup. Ct. Dec. February 15, 1913, page 192;

Adams Express Co. vs. Croninger, U. S. Sup. Ct. Dec. February 15, 1913, page 148;

Winfree, etc., vs. N. P. R. Co., U. S. Sup. Ct. Dec. March 15, 1913, page 273;

Second Employers' Liability Cases, 223 U. S. 1.

While this statute is not mentioned in the complaint, nevertheless, it is there alleged that the defendants were "doing business as common carriers in the District of Alaska, and were engaged in such business at all the times hereinafter mentioned,"

and defendant, Copper River & Northwestern Railway Company admits this allegation as to itself. It was not necessary for plaintiff to expressly allege and rely on the statute. If the facts alleged and admitted or proven show that the statute applied, then the rights and liabilities of the party depended upon that statute whether plaintiff relied upon the statute in his complaint or not.

“True, it is not distinctly alleged in the declaration that the action is based upon the Second Employers’ Liability Act; but we think this effect must be given to the averments of the declaration that deceased met his death while in the employ of the company and while it was engaged in interstate commerce. Such averments rendered the federal act alone applicable, and further, the case was tried and disposed of below upon that theory.”

Garrett vs. L. & N. R. Co., 197 Fed. 715.

See also:

Smith vs. D. & T. S. L. R. Co., 175 Fed. 506;

Cound vs. A. T. & S. F. R. Co., 173 Fed. 531;

Erie R. Co. vs. White, 187 Fed. 556;

McChesney vs. Illinois Central Ry. Co., 197 Fed. 85;

*Kelley's Administrator vs. C. & O. R. Co.,
supra.*

It follows, therefore, that as plaintiff was employed on a tunnel used in commerce by a railway in a territory, then if defendant, Copper River & Northwestern Railway Company, is liable at all, it could only be by virtue of the Federal Act.

The action is also based on the Federal statute as against the defendant, Katalla Company. The allegations against this company are the same as against the Railway Company, and plaintiff offered evidence for the purpose of proving that the Katalla Company was a common carrier by railway as alleged (R. pp. 116-122, 195-196).

Further, plaintiff requested the court to charge the jury in effect that the action is based on the Federal statute as to both defendants (R. pp. 250-254). In fact, the action could not be maintained against both companies unless based on the statute as to both, because being maintainable against the Railway Company only under the statute, an action against the Katalla Company under the common law could not be joined.

The case of *Kelley's Administrator vs. C. & O. R. Co., et al., supra*, was an action for damages for death, brought against the Railroad Company

and its employee, who was alleged to have been negligent in the matters complained of. The court held that the action could be maintained against the Railroad Company only under the Federal statute, and against the individual defendant only under the common law, because it is "limited to common carriers engaged in interstate commerce, and he is not such," the court saying:

"What we have here, then, is two causes of action joined together in the same suit, one against the corporate defendant under the national statute, and one against the individual defendant under the state statute, and it may be accepted that they are improperly joined."

That this ruling is correct would seem to require no argument. It follows, therefore, that in order to maintain this joint action, the liability of both defendants must be based either on the statute or on the common law, and cannot be based as to both defendants on both the statute and common law, or as to one defendant on the statute and as to the other defendant on the common law.

The Act "is in derogation of the common law and must be strictly construed."

Fulgham vs. Midland Valley Co., 167 Fed. 660;

Johnson vs. S. P. R. Co., 196 U. S. 1.

The Act is available only when two facts appear: First, the offending carrier must at the time of injury be “engaged in commerce between any of the several states, etc.”; (in this case in a territory), and, second, the injury must be suffered by an employee “while he is employed by such carrier in such commerce.” Both these facts must be present or the Act does not apply—the carrier must be actually engaged in interstate commerce, and the employee must also be taking part therein.

Pederson vs. D. L. & W. R. Co., 184 Fed. 739.

While this case was reversed by the Supreme Court of the United States, it was on other grounds, and the rule above stated was recognized as correct; the same rule has been recognized in all of the decisions arising under this Act.

It follows, therefore, that unless there is sufficient evidence to show that the Katalla Company was a common carrier by railway in Alaska at the time of plaintiff’s injuries, the joint action could not be maintained, and the joint judgment cannot be sustained.

Defendant Katalla Company denied in its answer that it was a common carrier by railway as

alleged in the complaint, and before plaintiff could recover against it under his complaint, or recover a joint judgment against both defendants, he was compelled to prove this allegation. The only evidence offered by plaintiff or in the case to prove this fact, is certain shipping receipts or bills of lading (Plaintiff's Exhibits "C," "D," "E," "F," "G" and "H," R. pp. 370-376), which were received over defendants' objection (R. pp. 117-119, 121-122, 196). These shipping receipts were dated respectively as follows:

Exhibit "C," May 4, 1911; Exhibit "D," May 3, 1910; Exhibits "E" and "F," August 16, 1910; Exhibit "G," March 21, 1911; Exhibit "H," March 29, 1911, all long before this accident.

The evidence of the shippers in connection with which these receipts were offered, was that they shipped goods over the railway line in question under these receipts at the date thereof. Neither witness knew or testified what company issued the receipts, but testified that the goods were shipped "over the Copper River & Northwestern line" (R. p. 160), or "over the Copper River Railway" (R. p. 170), or "over the line of the Copper River & Northwestern Railway" (R. p. 120), or "on the Copper River & Northwestern Railroad" (R. p.

196). There was no other testimony to show that the Katalla Company issued these bills, and so far as appears, the Copper River & Northwestern Railway Company may have issued them using the same blanks the Katalla Company might have used before turning the railroad over to the Railway Company, or that the Railway Company may have used blanks which had the name of the Katalla Company printed at the head, but which might never have been used by that company. In fact, the bills do not purport to be the bills of the Katalla Company, except that its name is printed at the top as "constructing and operating" the railway. There is not a particle of evidence that the Katalla Company issued these bills or even ever issued any similar bills, or that it carried any passengers or freight over the railway line, and especially there was no evidence to show that the Katalla Company was a carrier of freight or passengers over the railway line at the time and place plaintiff was injured. Certainly such evidence is not sufficient to bring the Katalla Company under the Federal statute, subjecting it to greater liabilities than it would have under the common law, and taking away many of its defenses.

Further, there was no suggestion in the evidence that *both* defendants were operating the rail-

way as common carriers at the time of plaintiff's injury, and that he was in the employ of both. The allegation and admission that the Railway Company was the common carrier at this time, in the absence of more evidence against the Katalla Company than was offered, certainly show that the Katalla Company was not such common carrier, and therefore this joint action could not be maintained or the joint judgment sustained.

It would seem to us beyond question that under the pleadings and evidence, the court was bound to grant the motion of one or the other defendant for a non-suit, or directed verdict or for a new trial on these grounds alone, and that it clearly erred in not giving defendants' instructions referred to in its 25th Assignment of Error.

NEITHER DEFENDANT IS LIABLE UNDER THE FEDERAL STATUTE.

Section 2 of the Federal statute provides that a common carrier by railroad in a territory, shall be liable in damages to a person in its employ for injury "resulting in whole or in part, from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines,

appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment.”

Before plaintiff could recover against either defendant either under the Federal statute or common law, it was necessary for him to establish that he was in the employ of that defendant. He alleges in his complaint that he was employed by both defendants. The Railway Company denied that he was in its employ, while the Katalla Company admitted he was employed by it at that time. Plaintiff testified that he did not know which company he was employed by (R. p. 48), but admitted that he received his pay in checks issued and signed by the Katalla Company, which checks were identified and introduced in evidence (R. pp. 135, etc.). After plaintiff was injured he was taken to the Katalla Company's hospital (R. p. 192). Some of the men working with plaintiff did not know which company they were working for (R. pp. 39, 46, 48, 94, 102); while one of these four men testified that he was then working for the Katalla Company (R. pp. 55, 57, 63, 64).

There was some evidence that these men then had identification checks marked with a “C,” but whether the “C” stood for Copper River & Northwestern Railway Company, or was merely a Katalla

Company's construction check, they did not know (R. p. 104). This evidence is certainly not sufficient to prove that plaintiff was in the employ of the Copper River & Northwestern Railway Company, at least that he was employed by the defendants jointly as alleged. On the other hand, we think it is established beyond doubt that he was then employed by the Katalla Company as alleged and admitted, and by that company alone. There is no claim or evidence of any agency existing between the two defendants; and no liability to plaintiff on the part of either defendant, by reason of such a relation, is or could be claimed. Again, the action can only be maintained under the statute against a common carrier by railroad in a territory, and we have shown that there is no evidence that the Katalla Company was such common carrier. It follows, therefore, that the action cannot be maintained against the Copper River & Northwestern Railway Company under the statute, because there is no proof plaintiff was in its employ, and cannot be maintained against the Katalla Company under the statute, because there is no proof it was a common carrier by railway in a territory, and subject to the Act.

But even if this action could be maintained against either company under the statute, no re-

covery could be had in this action under that statute for several reasons. In the first place, the statute gives a right of action only where the injury results in whole or in part "from the *negligence* of the officers, agents, or employees of the carrier, or by reason of a defect or insufficiency due to the negligence of the carrier, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves or other equipment." The allegations of negligence in this case are that defendants negligently failed "to furnish the plaintiff with a reasonably safe place to work; that said place was unsafe and dangerous by reason of the negligent failure of the defendants to suitably timber and protect the workmen employed in said tunnel from the danger of cave-ins and falling of material constituting the roof of the bore of said tunnel. All of which was known to the defendants, or by the use of reasonable diligence could have been known by them, but was unknown to the plaintiff."

There is no allegation of any negligence on the part of any officer, agent or employee of either defendant, unless it was their negligence, as representing the master, in providing defective or insufficient appliances, tracks, roadbed or other equipment. It is not claimed that the accident was caused

by the negligence of Sutton in pulling off the brace, and in fact, plaintiff's witnesses gave it as their opinion that this was not the cause of the accident, but that it was caused by not properly protecting the rest of the tunnel from caving in while excavations were made under the mud sills and new bents were put in. Nor can the judgment be sustained upon the theory that the accident was caused by any negligence on the part of Sutton in pulling off this brace, because the evidence not only fails to show that it was negligence on his part to pull off the brace, but does show affirmatively that it was necessary for him to pull the brace off in order to cut the dap in the old plate to admit the new bents, which he and plaintiff and the other carpenters were engaged in erecting. Nor could a recovery be had on the ground of Sutton's negligence in this particular, without an instruction to the jury that they were to determine from the evidence whether or not the accident was caused by any negligence on the part of Sutton, or that it resulted during the progress of the work plaintiff was assisting in, and because of the necessary manner in which such work was being performed, all of which was known to plaintiff. In view of the allegations of the complaint and the testimony in behalf of plaintiff as to the cause of the injury, defendants were not

bound to request such an instruction, and certainly in the absence of any instructions to the jury on this question, a judgment cannot be sustained upon this theory.

There is no statute in Alaska requiring a master to do anything to protect an employee under these circumstances, and therefore the measure of the carrier's duty in that particular is the rule at common law. If there would have been no negligence in this case at common law, then there was no negligence under the statute. Neither defendant was an insurer of plaintiff's safety in doing the work he was employed to do. Neither defendant was guilty of any negligence in the matters alleged, unless it owed plaintiff a duty in that regard and failed to exercise reasonable care and forethought in performing that duty. Let us see what the duty of a master to an employee is in a case like the present one, and see whether or not either defendant failed to use reasonable care or forethought in performing such duty.

Plaintiff was employed to make a place safe which was then unsafe and known to him to be so. The very work plaintiff was engaged to perform was to remedy the defect which he now complains of, namely, the liability of the tunnel to cave-in. He

was an experienced man, of full age and having all his faculties, and cannot be heard to say that he did not know that this work was dangerous. In fact, his testimony shows conclusively that he was fully aware of the dangers of a fall of the old bents of the tunnel, which he was engaged in strengthening. There had already been a cave-in due to the weakness of these old bents, and on one occasion he with others had gone at night to put in temporary posts to prevent the old timbers giving way (R. pp. 165, 166, 182).

Under these circumstances we think the law is well settled that where the servant is hired for the express purpose of assisting in repairing a known defect, the safe place rule does not apply, and where the injury resulted from the unsafe condition which arose there, and was incident to the work thus undertaken by the servant, there is no liability. It is only where the injury arises from other defects which are known to the master and unknown to the servant that the rule can apply.

Lobbatt's Master and Servant (2nd Ed.), Sections 924, 1174, 1175, and cases there cited.

Further, there is no negligence on the part of a master where the injury arises during the progress of the work. In this case it is clear that the acci-

dent happened either because the brace was pulled off to enable the daps to be cut in the old plates to admit the new bents plaintiff was engaged in putting in, or, as most of plaintiff's witnesses testified, because of the removal of the earth below the old mud sills to make room for the new mud sills, which were necessary before the new bents could be set up. In either event, it necessarily arose during the progress of the very work plaintiff was assisting in, all of which work was necessary, the manner and necessity of doing which plaintiff well knew. Under these circumstances and the well settled rules of law applicable thereto, we do not think there was any negligence shown on the part of either defendant, and therefore no recovery could be had against either in this case.

“There is a duty on the part of a master to provide his servants a safe place in which to work, but manifestly that principle is not applicable to a case like this, where the place becomes dangerous in the progress of the work, either necessarily or from the manner in which the work is done.”

Ry. Co. vs. Brown, 73 Fed. 970.

Where the place in which an employee was required to work, and where he was injured, was only

dangerous because of the negligence of his fellow workmen in carrying on the work, the risk from such danger was one which was assumed, and the master cannot be held liable for the injury.

Deye vs. Tool Co., 137 Fed. 480;

Armour vs. Hahn, 111 U. S. 313.

“As a general rule, it is the master’s duty to furnish a reasonably safe place for his servants to work, but this rule has no application where the very work the servant is employed to do and assist in doing consists in making a dangerous place safe, and particularly where the dangerous character of the place is fully apparent, and known to the servant.” (Citing cases.) “Where the servant, fully apprised of the dangerous character of a place, yard, building, or construction, is employed to assist in clearing up and making the same safe, and works therein for that purpose, he undoubtedly assumes the risks attendant, and in this respect the charge of the court was clearly erroneous.”

Kansas City S. Ry. Co. vs. Billinslea, 116 Fed. 335, at 340.

“It is the general rule that it is the duty of the master to exercise ordinary care to provide a reasonably safe place in which the serv-

ant may perform his service. *Railway Co. vs. Jarvi*, 53 Fed. 53, 3 C. C. A. 433, 10 U. S. App. 439. But this rule cannot be justly applied to cases in which the very work the servants are employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses. The duty of the master does not extend to keeping such a place safe at every moment of time as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight. When he engages in the work of making a place that is known to be dangerous, safe, or in a work that in its progress necessarily changes the character for safety of the place in which it is performed as the work progresses, the hazard of the dangerous place and the increased hazard of the place made dangerous by the work are the ordinary and known dangers of such a place, and by his acceptance of the employment the servant necessarily assumes them."

Finlayson vs. Utica Mining & Milling Co.,
67 Fed. 507.

It is no answer to say that other precautions might have been taken to prevent the cave-in. Even if the posts that had been used in other places in the tunnel had been put in here, there was no obligation on the part of either defendant to put them in, and there is no evidence from which the jury could say that it was negligence on the part of either defendant not to put in such posts. For all that appears in the evidence the weakness in these other cases, where the caps were broken, may have been much greater than that of the four bents in question, and the use of such posts may have strengthened these other bents, while they might not have added any strength whatever to the bents in question. In fact, there is nothing in the evidence from which the jury could say that the use of such posts in this case would have prevented the accident occurring, after the earth was excavated and the brace torn off during the progress of the work.

The undisputed evidence as to what precautions were taken to prevent a cave-in, and the fact that for more than a week these old bents, braced as they were, did not fall until the earth was necessarily excavated and the brace removed during the progress of the work, and in order to enable plaintiff to perform the work he was engaged to do,

proves conclusively, in the absence of any other evidence, there was no negligence in the matters alleged and relied upon.

No recovery could be had against either defendant under the statute for another reason. Section 4 of the Act of 1908 provides that in an action brought under the provisions of that Act, the "employee shall not be held to have assumed the risks of his employment, *in any case where violation by such common carrier of any statute enacted for the safety of employees, contributed to the injury or death of such employee.*" The court will note that Congress has recognized in this and the preceding section of the Act the clear distinction between contributory negligence and assumption of risk. In Section 3, it has taken away the defense of contributory negligence entirely, except that the employee's damages shall be diminished in proportion to the amount his negligence contributed thereto. But the statute has taken away the defense of assumption of risk only where the carrier has violated some statute enacted for the safety of the employee, which violation contributed to the injury.

This statute being in derogation of common law, must be strictly construed, and the court cannot read into the statute anything not clearly within its ex-

press terms. The rule of assumption of risk has its basis in the principles of the common law, and depends for its existence upon the relation of employer and employee existing between the parties. While some courts base the rule upon the maxim, "*volenti non fit injuria*," the free translation of which is that he who prefers to remain in the presence of an obvious or manifest danger cannot recover for injuries resulting therefrom, other courts base the defense upon the contract of employment between the parties.

However, we do not think it necessary in this case to discuss whether the doctrine of assumption of risk is based upon contract, or the maxim, "*volenti non fit injuria*," although we think this court is committed to the view that the defense is based upon contract.

Welsh vs. Barber Asphalt Paving Co., 167
Fed. 465.

But whether arising from contract or based on the maxim, we think it makes no difference in this case. If based upon contract, then the effect of the contract between the parties was that plaintiff contracted to do his work with reference to the tunnel being guarded as it was, which fact he well knew, and which he contracted should not be neg-

ligence on the part of his employer if left in this condition. He also contracted with reference to the manner in which this work should be performed, and that it should not be negligence on the part of his employer to perform the work in this way. On the other hand, if the defense is based on the maxim, then it clearly appears that he voluntarily continued in his employment well knowing what precautions had been taken to guard against the tunnel falling in, and as he made no complaint of this condition, and never requested that other precautions be taken, and was never promised that any should be, and did not himself take any other precautions, although there was plenty of material at hand which he might have used for that purpose, he willingly assumed all the risk of injury, because of the condition of the place where he was to do his work.

We do not think there can be any question but that the defense of assumption of risk under the Federal statute remains as it was at common law, except in the one instance named in the statute, namely, where the injury is caused by the violation of a statute for the employee's safety.

When we consider that Congress, in the Second Employers' Liability Act, undertook to cover the entire field so far as was desired, of the relation-

ship between carrier and employee, and in doing so took occasion to expressly designate the particular risks of injury which the employee should not assume, it logically follows that Congress meant to declare that the common law still remains in existence as to all other cases where the defense would be available in the absence of this statute. It cannot be claimed that Congress intended to repeal the entire common law in relation to assumption of risk, and unless it did so, the common law, except as modified by the express terms of Section 4 of the Act, is still in force.

The Supreme Court of Idaho, in the case of *Neil vs. Idaho & W. N. R. Co.*, 125 Pac. 331, 335, speaking through Mr. Justice Sullivan, says:

“1. We will first determine whether said Act of Congress is applicable to the facts of this case.

“That Act of Congress refers only to the inter-state commerce, abrogates the fellow-servant rule, extends the carrier's liability to cases of injury and death, and restricts the defense of contributory negligence and assumption of risk.”

The learned judge, at page 336, indicates in

what manner the defense of assumption of risk has been restricted, saying:

“Under the provisions of Section 4 of said Act, it is provided that the employee shall not be held to assume the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the death or injury of such employee, and, as it is not claimed in this case that the company had violated any statute enacted for the safety of employees the defense of assumption of risk remains as at the common law.”

The Supreme Court of Texas, in the case of *Freeman, Receiver, vs. Powell*, 144 S. W. 1033 (decided February 3, 1912), in which Mr. Justice Conner, speaking for the court, after quoting Section 4 of the Act of April 22, 1908, said:

“It thus appears that under the Federal statute a complaining employee to whom the Act applies is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation by the carrier of some statute enacted for the safety of an employee which has contributed to his injury or

death, and of this there is no contention in this suit.”

We think our contention in this regard is also clearly recognized in the following cases:

Scott vs. C. R. I. & T. R. Co., 141 N. W. (Iowa) 1065;

Texas & P. R. Co. vs. Harvey, U. S. Sup. Ct. Dec. May 15, 1913, page 518;

Boston & M. R. Co. vs. Benson 205 Fed. 876;

Second Employers' Liability Acts, 223 U. S. 1.

“So far as risks are obvious, pertaining to the apparently permanent features of the business as it is openly conducted, an employer has a right to believe that his employee agrees to assume them. They are, therefore, not included among those to be guarded against in the performance of his general duty to furnish reasonably safe appointments for the employee, and the employer cannot be held guilty of negligence in failing to make provision against them.”

Murch vs. Thos. Wilson's Sons & Co., 74 N. E. 111 (Mass.)

“There exists an exception to the general rule that an employee may assume that reason-

able care will be observed by his employer for his protection, which is that where a defect in machinery is known to an employee or is so patent and obvious as to be readily observable while engaged in his work, and he continues in the use and operation thereof notwithstanding the defect, he assumes the risk and hazard attending such use. The reason for the exception is that having such knowledge or possessed of the ready means of acquiring it and shutting his eyes to palpable conditions, he elects to engage in the service, and therefore to undergo the hazard on his own account."

Katalla Company vs. Rones, 186 Fed. 30.

"At common law a servant assumes the general risks of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty. This rule is subject to the exception, that, where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective appliance, in the face of knowledge and without objection, with-

out himself assuming the hazard incident to such situation. If a defect is so plainly observable that the servant may be presumed to know its existence, and he continues in the master's employment, without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot recover."

Texas & P. R. Co. vs. Harvey, U. S. Sup. Ct. Dec., May 15, 1913, page 518.

"The workman assumes those risks of danger which are ordinarily incident to the work in which he is engaged, and those which are open and obvious to the senses, and which are known to him, if he continues in the occupation."

Pacific T. & T. Co. vs. Starr, *supra*.

"Plaintiff knew the very danger that he complains of as constituting the negligence of defendant, and it must be held as a matter of law that he assumed the risk."

Elmer vs. Mutual Steamship Co., 130 N. W. 1104 (Minn.)

NEITHER DEFENDANT IS LIABLE AT COMMON LAW.

We do not think any further argument is necessary to show that plaintiff could not recover

against either defendant under the common law. If there was no negligence under the statute, there certainly was none under the common law. If plaintiff assumed the risks under the statute, he certainly did so under the common law. If it could be said that the accident was caused by any negligence on the part of Sutton in pulling off the brace, it was the act of a fellow servant, for which neither defendant would be liable. But the action was not based on the common law and could not be maintained against the defendant Railway Company under the common law. Neither was it submitted to the jury under any proper instructions as to the rules of law applicable to such a case. Therefore, the judgment must be sustained by virtue of the statute or not at all.

ERRORS IN ADMISSION OF EVIDENCE.

Over the objections of defendants, the court admitted in evidence the shipping receipts marked Plaintiffs' Exhibits "C," "D," "E," "F," "G" and "H." These were admitted for the purpose of proving that the Katalla Company was a common carrier by railway in Alaska at the time of plaintiff's injury. As we have already shown there was no evidence even tending to prove that the Katalla

Company issued these bills, or ever issued any similar bills, or that it was at the time of the issuance of these bills or at any subsequent time, engaged in business as a common carrier upon this railway. It would seem to us not to require any argument to show that the admission of these receipts, without in any way connecting the defendant, Katalla Company, with them, other than the fact that its name was printed at the head of the bills, and not anywhere in the body, and without any other evidence to connect that company with these bills, was prejudicial error.

ERRORS IN INSTRUCTIONS GIVEN AND REFUSED.

The court instructed the jury as follows:

“You are first instructed that an employer of labor is obliged and bound to furnish a reasonably safe place in view of the circumstances of the labor or the work to be done, the surrounding circumstances, and maintain it as a reasonably safe place for the employees to work in.”

Assignment of Error No. 10 (R. p. 324).

This instruction was not a correct statement of the law under the authorities we have already cited.

The court also instructed the jury as follows:

“Taking those two broad principles of law, your duty then will be to decide in this case, what was the cause of Mr. Reeder’s injury, about which there is no doubt or no contention—that is, the extent of the injury or accident may be a question for you,—what was the real, proximate cause of his injury.”

Assignment of Error No. 11 (R. p. 324).

As this instruction was based upon the instruction last referred to, it was clearly erroneous, if the former instruction was incorrect.

The court also instructed the jury as follows:

“In my opinion law is common sense. We may differ sometimes as to what is common sense, the broad term,—so sometimes we may differ as to the law. Since I believe it to be founded on common sense, I am going to try to take you along with me in the reasoning of the law, as well as giving you the law in this case.”

Assignment of Error No. 12 (R. p. 324).

We think this instruction was clearly erroneous for the reason that it gave the jury to understand that the law of the case is “common sense,” and that they might apply what they considered “com-

mon sense" in this case, rather than the rules of law as laid down by the courts.

The court also instructed the jury as follows:

"It has been, it seems to me justly, held that if the proximate cause of an injury such as this, was on the part of the employer of the labor, that the employer is liable. It has been held upon the other hand, that if the proximate cause of the injury was upon the plaintiff himself, Mr. Reeder in this case, or upon one of his fellow-workmen who were working with him, and through no fault of the defendants, then he could not recover. To illustrate what the law believe to be correct and what is common sense, I will give you two illustrations, founded upon two cases.

Imagine, if you will, that two men are working at this table, one facing this way and one this way and two men similarly working at that table over there, say upon tin or iron plate ware. One of the workmen would be standing with his back to an alleyway 10 or 12 feet wide and the other facing it. That it was the duty of those employed to stand here and do their work and perform their duties. While he was so working, two other men from some other

part of the same room came along with a truck, we will say, a four-wheeled low-truck, with an ordinary handle, with a cross-piece at the end, that you see upon trucks around railroad freight stations outside, where the wheel works very easily under the first axle. And while they were coming in with a load of tinware that was used upon the table in the ordinary course of business, one of the wheels, we will say, dropped into a little hole in the floor, a hole sufficient, a hole sufficiently large with *with* the load upon it to stop the truck for a moment, and the man at the tongue handle, or whatever you may call the steering apparatus by which he was pulling, kinder wiggled it as a man naturally would, attempting to pull the load from the hole, with the other man pushing behind the load. That while he was so wiggling and pulling and the other pushing to get it from the hole, a lot of tin or iron ware fell off the truck and injured this first man standing here with his back to that board and to that hole in the floor.

Now, in that case, although the plaintiff there and the boy or man standing here might have known of the hole, it is the law and was so held that even though he knew that, he did not

as a part of his employment there have a right to assume or anticipate that he might be injured in the way he was by reason of that hole. That by reason of that hole being in the floor it was the duty upon the employer of these men in that room to have remedied that hole and that, although probably the wiggling of the tongue on that load at that particular time caused the tinware to slip off the truck, the real cause, the proximate cause of that injury, was the defect in the floor.

The case of the opposite result, in which the actions of a fellow workman exonerated an employer of labor from an injury was that in which a common derrick was used, which consists, as you all know, I presume, of a boom and a mast, the mast being the upright piece and the boom goes off at an angle. In that instance men were employed to erect the boom and mast and when they were about completed, the base, which would probably be a long piece of wood, depending of course upon the size, length, etc., of the derrick, probably we will say the length of that rug and in dimensions proportionate to hold the load it was calculated to hold—that piece of wood had been placed in position and

holes bored, through which iron bolts of sufficient size were to be put and the nuts screwed down, of course, to hold it in position. For some reason, either the bolts had been mislaid or had not been completed or something, on the completion of the work on a certain day, they walked away without putting those bolts in; that was to be left to be completed on a subsequent day but before the derrick was to be used.

Now, it happened that the engineer who had control of the machinery running that derrick knew that, as well as the foreman and the man who was injured. The next day the foreman, who was a fellow-servant to the injured man, ordered an attachment to be made to a piece of stone and the engines to be started and the stone lifted by that derrick. The first pull did not succeed in lifting the stone. The foreman told him to go ahead and lift it; anyhow he made another pull and of course the bottom of the derrick, not being fast upon the resting piece as it should have been, it very naturally buckled out and gave way at the bottom and the boom of the derrick hit the plaintiff and injured him.

Now, the company in that case was held

not liable because they claimed that the proximate cause in that case was the negligence of the foreman who knew that the bolts were not put in there and the company had done all they could to prevent them going ahead and using that derrick until it was fixed. That that was a risk that the company could not in reason have apprehended would happen. They expected that the men would do what their good common sense would tell them to do and they had no right under the circumstances to anticipate that a man would so far forget and fail to do his duty as to start up and use a derrick before the bottom was fastened, and the man in charge in the erection of the derrick had ordered them not to so use the derrick.”

Assignment of Error No. 13 (R. p. 325).

It would seem to us that no authority is necessary to show that this instruction was incorrect, and confusing to the jury, and gave no light as to the law applicable to the evidence in this case.

The defendants requested the court to give to the jury certain instructions which were refused, and which are set out in full in Assignments of Error Nos. 14 and 16 to 34 inclusive.

The argument we have already made in this brief, and the authorities heretofore cited we think show that each and all of these instructions were proper and should have been given. No similar instructions were given by the court, and we feel that the instructions which were given left the jury at sea as to what the law applicable to this case is, and that the court committed prejudicial error in refusing to give each and all of these requested instructions.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the trial court should be reversed and the action dismissed, or a new trial granted.

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No. 2299.

*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

COPPER RIVER AND NORTHWESTERN
RAILWAY COMPANY, a Corporation, and
KATALLA COMPANY, a Corporation,
Plaintiffs in Error,
vs.

DANIEL S. REEDER,
Defendant in Error.

Upon Writ of Error to the District Court for Alaska,
Third Division.

Brief of Defendant in Error.

**MOTION OF THE DEFENDANT IN ERROR TO
STRIKE OUT CERTAIN PORTIONS OF
THE TRANSCRIPT.**

Now comes the defendant in error, by his attorney,
Mr. J. H. Cobb, and moves the Court to strike from
the transcript herein the following portions, to wit:

- 1st. Motion (of Katalla Co.) for nonsuit (R.
23, 24);
- 2d. Motion (of Copper River & N. W. Ry. Co.)
for nonsuit (R. 24-26);
- 3d. Motion (of Copper River & N. W. Ry. Co.)
for nonsuit (R. 27, 28);
- 4th. Motion of (Katalla Co.) for nonsuit (R.
29, 30);

for the reason that said papers are not embodied in
any bill of exceptions, nor authenticated so as to be-

come a part of the record on writ of error, in this case, and should not have been copied into the transcript.

Defendant in error further moves the Court to strike from the transcript the following papers, to wit:

- 1st. Plaintiffs' request for instruction (R. 247-254);
- 2d. Instructions requested by the Copper River & N. W. Ry. Co. (R. 255-264);
- 3d. Instructions (requested by Katalla Co.) (R. 264-273);
- 4th. Defendant's exceptions to Court's instructions to jury (R. 273-277);
- 5th. Motion (of Copper River & N. W. Ry. Co.) for new trial (R. 279, 280);
- 6th. Motion (of Katalla Co.) for new trial (R. 281, 282);

for the reason that none of said papers are embodied in any bill of exceptions, or otherwise authenticated so as to become a part of the record on writ of error, and in the absence of such authentication, such papers are not properly a part of such record, and should not be copied into the transcript.

Defendant in error further moves the Court to strike out the document, or paper, entitled "Transcript of Testimony, etc.," beginning on page 33 of the transcript and ending on page 244, for the following reasons, to wit:

Said paper, or document, purports to contain the testimony at the trial and the instructions given the jury by the Court, and is manifestly intended as a bill of exceptions, but the same is not signed by the

Judge of the court below, or otherwise properly authenticated so as to become a part of the record on writ of error.

ARGUMENT ON MOTION.

It is difficult to understand what object the plaintiff had in having the papers, found in the transcript from pages 23 to 30, and from pages 247 to 282, sent up. Not being embodied in a bill of exceptions or otherwise authenticated by the Judge below, they are in no sense a part of the record in an Appellate Court, and are not reached by a writ of error which is directed to the record, viz., the judgment-roll, and such matters as are brought into the record by the bill of exceptions.

Duncan vs. Atchison T. & S. F. Ry. Co., 72 Fed. 808;

Sternenberg vs. Mailhas, 99 Fed. 43.

The paper entitled "Transcript of the Testimony, etc.," found on pages 33 to the middle of page 244, was evidently intended to answer the purpose of a bill of exceptions. But it is not signed by the Judge of the court below, as required by law. There is in the transcript an "order allowing, settling, and certifying bill of exceptions," and following the order, a "certificate to bill of exceptions" (R. 245-247). Each of these documents is filed separately (R. 33, 246 and 247).

"The signature of the Judge to an order (allowing and settling a bill of exceptions) did not constitute a signature to the bill of exceptions."

Dalton vs. Hazelett, 182 Fed., at p. 558.

STATEMENT OF THE CASE

The condition of the record is such that we do not believe any of the questions raised, or attempted to be raised, by the plaintiffs in error, can properly be considered by this Court. Of the thirty-five assignments of error, four have been abandoned. The remaining thirty-one have been arranged in three groups, and three questions are argued in the brief. Before taking up these three contentions, we will briefly state the nature of the case, using the same terms to designate the parties as were used in the court below. We shall assume, without conceding it, that the paper entitled "Transcript of Testimony" is a bill of exceptions.

Plaintiff recovered a judgment against the defendants jointly and severally for personal injuries sustained by him while in their employ. From the admissions in the pleadings, the evidence, and verdict of the jury, the following facts are established:

1st. Plaintiff was in the employ of the defendants, both common carriers, at the time he sustained his injuries. (Defendant Katalla Company admits this as to it. Plaintiff testified he was in the employ of the Copper River & N. W. Ry. Co. (R. 47-49). His pay checks were countersigned by the Railway Co. officers (R. 183). The Katalla Company and the Railway Company appear to have been one and the same concern, and both were operating the railroad.)

2d. Plaintiff was seriously injured while in such employ, by the caving in of the tunnel in which he was at work.

3d. This cave-in was due to the negligence of the superintendent in charge of the work.

The way the accident occurred is correctly stated in the brief of the plaintiffs in error, with some important omissions which we add: Prior to the time that plaintiff left the tunnel work, some four or five days before the accident, Mr. Forrester, an employee of the defendant companies since April, 1908 (R. 224), and who had entire supervision of the work (R. 226), had had heavy braces put under each bent, reaching from the floor of the tunnel, on each side, to the middle of the roof, so as to strengthen it, while the new timbers were put in place (R. 113, 116, 182, 183). The last four bents he considered safe without these braces and did not have them put in (R. 229). On the morning of August 7, plaintiff, by order of his superior, returned to work in the tunnel, and almost on the instant he reached his place of work these unbraced bents fell, killing two men, and injuring others, plaintiff among them (R. 49-54).

I.

Defendants' first contention is—

1st. That there is no proof that plaintiff was in the employ of the Railway Company.

2d. That there is no proof that the Katalla Company was a common carrier. Hence, there is a fatal misjoinder of causes of action.

This question, it is contended, is raised by the 8th, 9th, 25th, 28th and 35th assignments. No such question was raised in the court below.

The 8th assignment, based on the refusal of the Court to grant a nonsuit as to both defendants, was

waived, by the introduction of evidence in defense. The motion is not, however, in any pretended bill of exceptions.

The 9th assignment is based upon the refusal of the Court to direct a verdict. The motion is not in any purported bill of exceptions, and cannot, therefore, be considered; but if it could, it was manifestly rightly overruled.

The 25th assignment is based upon the alleged refusal of instruction. There is absolutely nothing in the *record* to show that such instruction was ever asked or refused. There is in the Transcript two papers filed four days after the verdict was returned (R. 253-272), entitled, respectively, "Instructions requested by Copper River & N. W. Ry. Co.," and "Instructions requested by Katalla Co." These two papers are unsigned by anyone, and the *record* is silent as to whether they were ever presented to the Court or acted upon in any way. The purported exception to the purported refusal to give the instructions was taken, or rather purports to have been taken May 5th, nine days after verdict. (R. 275-277.)

The 35th assignment complains of the action of the Court in denying motion for new trial—a question never considered in a Federal Appellate Court.

So that not only was the question argued in the brief not raised in the court below, but it is not raised on the record in this court. But if it had been, the citation to those parts of the record we have made and will make show it could never have been successfully raised. (In addition to the evidence cited in

the statement *supra*, the record shows the Katalla Company was operating the railway as a common carrier. Testimony of Feldman, R. 195, Kinney, 120, Reily, 116, Plffs. Ex. "C" to "H," inclusive.)

II.

Defendants in their brief next group together assignments of error Nos. 8, 9, 10, 13, 14, 16-24, 26-35. We have already dealt with 8, 9, 28 and 35.

Under this group, defendants contend that the evidence wholly fails to show a cause of action against either defendant. Let us briefly examine the remaining assignments upon which it is sought to raise this question. Nos. 10 to 13, inclusive, complain of certain instructions. If the paper entitled "Transcript of Testimony, etc." (R. 33-244), can be considered a bill of exceptions, then there is no exception to any of the instructions complained of. If it is not a bill of exceptions, then the instructions are not in the record. In any event, these assignments cannot be considered. The remaining assignments under this group complain of the alleged refusal to give certain instructions. But as pointed out already, the record fails to show any requests for instructions, or at least until four days after verdict, or any exceptions, or at least any until nine days after verdict.

However, as we have already pointed out, there was abundant evidence to sustain the verdict.

III.

Defendants, in their brief, next group together assignments of error Nos. 5, 6, 7, 11, 12 and 28.

The first three complain of the admission in evi-

dence of the bills of lading issued by the Katalla Company operating the Copper River & N. W. Railway, and the testimony in connection therewith. Of these assignments it is sufficient to say that if there is any better evidence than that the Katalla Company was holding itself out as operating the railway, issuing bills of lading, and collecting freight money, to prove it was a common carrier, defendants have failed to suggest it in their brief. It is argued, however, that because the evidence was not confined to the very time of the accident, it was not pertinent. This objection was barely mentioned in the court below (R. 118) and not urged, or it might have been cured. Be that as it may, if the Katalla Company ceased to be a common carrier after May and before August 7, 1911, it would have been an easy matter for the defendants to have shown it. They offered no evidence whatever in this issue, and the jury rightly concluded it was a common carrier at all times during the year.

Assignments Nos. 11 and 12 complain of certain instructions. These assignments, as already pointed out, should not be considered.

No. 28 complains of the alleged refusal to give certain purported requests for instructions. We can add nothing to what has been said already as to these purported requests.

In conclusion we wish to say that the defendants had a fair trial in the court below; they apparently abandoned all hope of a complete defense, and sought merely to reduce damages. After verdict only did they seek to raise most of the questions they have

argued here. This is neither fair to the Court below, to this Court, nor to the defendant in error.

We respectfully ask that the judgment be affirmed.

J. H. COBB,

Attorney for Dan S. Reeder, Defendant in Error.

1. The first part of the paper is devoted to a general discussion of the problem of the existence of a solution of the system of equations (1) for arbitrary values of the parameters α and β . It is shown that the system has a solution for arbitrary values of the parameters α and β if and only if the condition $\alpha + \beta = 1$ is satisfied. In this case the solution is unique and is given by the formula

$$x = \frac{1}{\alpha + \beta} \left(\alpha x_1 + \beta x_2 \right)$$

where x_1 and x_2 are the solutions of the system of equations (1) for $\alpha = 1$ and $\beta = 0$ and for $\alpha = 0$ and $\beta = 1$ respectively.

2. In the second part of the paper the problem of the stability of the solution of the system of equations (1) is considered. It is shown that the solution is stable for arbitrary values of the parameters α and β if and only if the condition $\alpha + \beta = 1$ is satisfied. In this case the solution is stable and is given by the formula

$$x = \frac{1}{\alpha + \beta} \left(\alpha x_1 + \beta x_2 \right)$$

where x_1 and x_2 are the solutions of the system of equations (1) for $\alpha = 1$ and $\beta = 0$ and for $\alpha = 0$ and $\beta = 1$ respectively.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COPPER RIVER & NORTH-
WESTERN RAILWAY COM-
PANY, a corporation, and
KATALLA COMPANY, a cor-
poration,

Plaintiffs in Error,

. vs.

DANIEL S. REEDER,

Defendant in Error.

No. 2299.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
TERRITORY OF ALASKA
THIRD DIVISION.

**REPLY BRIEF OF PLAINTIFFS
IN ERROR**

W. H. BOGLE,
CARROLL B. GRAVES;
F. T. MERRITT, and
LAWRENCE BOGLE,

Attorneys for Plaintiffs in Error.

610 Central Building,
Seattle, Washington.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COPPER RIVER & NORTH-
WESTERN RAILWAY COM-
PANY, a corporation, and
KATALLA COMPANY, a cor-
poration,

Plaintiffs in Error,

vs.

DANIEL S. REEDER,

Defendant in Error.

No. 2299.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT OF THE
TERRITORY OF ALASKA
THIRD DIVISION.

**REPLY BRIEF OF PLAINTIFFS
IN ERROR**

The matter in this reply brief will be directed solely to the motion to strike contained in the brief of the defendant in error and the argument in support of that motion, with the exception of a citation to a case referred to upon oral argument of this cause.

I.

On page 1 of his brief, defendant in error moves to strike the motions for non-suit and motions for directed verdict interposed by the plaintiffs in error in the course of the trial below, for the reason that these motions are not embodied in the bill of exceptions. It appears, however, in the bill of exceptions, (see pages 196 and 197 of printed record) that plaintiffs in error filed separate motions for non-suit, and exception was allowed to each of them. Also it appears in the bill of exceptions (see page 232 of printed record) that each of the plaintiffs in error filed a motion for directed verdict, which motions were overruled and exceptions allowed.

Each of the above referred to motions were in writing, and the record shows that they were filed at the time they were interposed. These motions are certified in the transcript. (Printed Record, pages 23 to 31 inclusive.) While the grounds of these motions are not recited in the bill of exceptions, yet, under the statute of Alaska, to be hereinafter noted, these motions being matters in writing and on file, are already a matter of record, and of course need not be carried into the bill of exceptions. This is particularly true when the bill of exceptions

itself discloses the making and overruling of the motions and recites the fact that such motions were filed in the cause. The Alaska statute referred to is as follows:

“The statement of the exception, when settled and allowed, shall be signed by the Judge and filed with the Clerk and thereafter it shall be deemed and taken to be a part of the record of the cause; no exception need be taken or allowed to any decision upon a matter of law when the same is entered in the journal or made wholly upon matters in writing and on file in the court.”

Sec. 1055, Chap. XXI, *Compiled Laws of the Territory of Alaska*, 1913.

II.

On page 2 of its brief, defendant in error moves to strike requested instructions of plaintiff and defendants below, and defendants' exceptions to the court's instructions to the jury, and defendants' motions for new trial. We shall omit any reference to the requested instructions, since all exceptions to the proceedings and judgment below are preserved by other portions of the record, and the contentions of plaintiffs in error here, contained on pages 15 to

18 inclusive of their brief, are reviewable without reference to any error in refusing the requested instructions.

(a) While the exceptions to the instructions given by the court (Printed Record, 273) were not carried into the bill of exceptions, yet they were in writing, filed in the court, and were presented to the court, allowed by the judge, and entered in the minutes of the court. It is true that the undeviating rule in the Federal courts is that the exception to the instructions must be taken at the time of trial, but such is not the rule in the Territory of Alaska. Chapter XVII of the Compiled Laws of Alaska provides for the conduct of the trial and the charge to the jury, but does not regulate the manner of taking exceptions. However, this point is covered by Section 1053 of the Compiled Laws of Alaska, 1913, which reads as follows:

“Section 1053. The point of the exception shall be particularly stated and may be delivered, in writing, to the judge, or entered in his minutes, and at the time or afterwards be corrected until made conformable to the truth.”

As we have seen, Section 1055 provides that when the exception shall have been signed by the

judge and filed with the clerk, it shall be taken to be a part of the record of the cause. In this particular instance the exceptions were presented and signed by the judge. (Printed Record, 277.)

(b) A motion for a new trial is made, by the statute of Alaska, a matter of writing, and in this case the motion was made in writing and filed, thereupon overruled, and exception allowed. (Printed Record, 281-283.) Of course it is contended by counsel for defendant in error that the action of the court in denying the motion for new trial is a question never considered in a Federal appellate court. That contention is correct in cases not reviewable from a territorial district court, where the subject of new trial is controlled and governed by the territorial statute. One of the grounds of new trial in the Territory of Alaska is, insufficiency of the evidence to justify the verdict or other decision, or that it is against law; and, error in law occurring at the trial and excepted to. (Sec. 1058 Compiled Laws, *supra*.)

In any event, the errors complained of and relied upon in this proceeding are raised without reference to the motion for new trial.

III.

Defendant in error moves the court to strike the bill of exceptions, styled by him "Transcript of Testimony," ending on page 244 and certified to at page 246 of the record, upon the ground that the certificate is a document filed separately. An inspection of the certified transcript shows that the certificate of the judge is attached to, annexed to, and made a part of the bill of exceptions, and refers to the foregoing bill of exceptions to which it is attached, and therefore does not in any manner, as a matter of fact and of record, come within the objection urged by defendant in error on page 3 of his brief.

In conclusion, upon the point of this motion, we urge now, as we urged in the oral argument, that every error presented here as constituting grounds for a reversal of the judgment below, was presented in some form or other to the trial court by sufficient exception, all of which exceptions were allowed and they have all been presented here upon sufficient assignments.

It would seem that courts of review are not now inclined, nor should they be so inclined, to spy

out technical reasons to avoid the passing upon questions that were fairly considered below and are

explicitly brought on for review in the appellate court. If an appeal or writ of error has been fairly sued out and is fairly presented to the appellate court, that court will consider the questions presented and not split hairs in an attempt to divest itself of its appellate prerogative or jurisdiction, when such appellate jurisdiction is one of the guaranteed privileges of the litigant. The defendant in error in this case has but idly attempted to defend the judgment below, but has contented himself with seeking escape from the assignments of error by raising technical objections to the state of the record, whereas, the record itself, no matter how inartisticallly it may have been prepared or presented, shows that the very questions presented here were presented to the court below and fairly excepted to.

The attention of this court is respectfully called to the case of *Central Vermont Ry. Co. vs. Bethune*, Circuit Court of Appeals, First Circuit, 203 Fed. Rep., 868, decided since the filing of the original brief of plaintiffs in error, and which is here cited

in support of the positions assumed at pages 79 to 87 inclusive of said brief.

Respectfully submitted,

W. H. BOGLE,

CARROLL B. GRAVES,

F. T. MERRITT, and

LAWRENCE BOGLE,

Attorneys for Plaintiffs in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE M. TAGGART,

Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Appellee.

Transcript of Record

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.*

RECEIVED

AUG 16 1913

F. D. MONCKTON,
CLERK

FILED

AUG 22 1913

United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE M. TAGGART,

Appellant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Appellee.

Transcript of Record

*Upon Appeal from the United States District Court
for the Eastern District of Washington,
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*In the United States District Court for the Eastern
District of Washington, Northern Division.*

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

NAMES AND ADDRESSES OF SOLICITORS
OF RECORD.

C. J. FRANCE, Solicitor for Complainant,
436-439 Burke Building, Seattle, Washington.

FRANK P. HELSELL, Solicitor for Complainant,
436-439 Burke Building, Seattle, Washington.

F. V. BROWN, Solicitor for Defendant,
King Street Station, Seattle, Washington.

CHARLES S. ALBERT, Solicitor for Defendant,
Great Northern Passenger Station, Spokane, Wash.

THOMAS BALMER, Solicitor for Defendant,
Great Northern Passenger Station, Spokane, Wash.

*District Court of the United States, Eastern District of
Washington, Northern Division.*

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

SUBPOENA IN EQUITY.

THE PRESIDENT OF THE UNITED STATES OF
AMERICA:

To The Great Northern Railway Company, a Cor-
poration:

YOU ARE HEREBY COMMANDED, That you be
and appear in said District Court of the United States
aforesaid, at the Court Room, of said Court, in the City
of Spokane, Washington, on the 6th day of January,
1913, to answer a Bill of Complaint filed against you
in said Court by George M. Taggart, a citizen of the
State of Washington, and to do and receive what the
Court shall have considered in that behalf. And this
you are not to omit, under the penalty of Five Thou-
sand Dollars.

WITNESS, the Honorable FRANK H. RUDKIN,
Judge of the United States District Court for
the Eastern District of Washington, and the
seal of said District Court this 25th day of
November, 1912.

(Signed) W. H. HARE, Clerk.

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT, U. S.

YOU ARE HEREBY REQUIRED to enter your appearance in the above mentioned suit on or before the first Monday of January, 1913, next at the Clerk's Office of said Court, pursuant to said Bill, otherwise the said Bill will be taken pro confesso.

(SEAL)

(Signed) W. H. HARE, Clerk.

United States of America,
Eastern District of Washington,—ss.

I HEREBY CERTIFY, That I served the within writ by delivering to and leaving a true copy thereof with D. G. Black, General Agent for the Great Northern Railway Company in Spokane, Washington, on the 26th day of November, 1912, and at the same time and in the same manner I served upon the said D. G. Black a copy of the Bill of Complaint herein.

Fees: \$4.06.

November 26, 1912.

(Signed) W. A. HALTEMAN,

United States Marshal,

By A. M. DAILEY,

Deputy.

Endorsements: Subpoena in Equity.

Issued November 25, 1912, and returned and filed in the U. S. District Court for the Eastern District of Washington, November 26, 1912.

W. H. HARE, Clerk,

By S. M. RUSSELL, Deputy.

*In the United States District Court for the Eastern
District of Washington, Northern Division.*

No.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

BILL IN EQUITY.

To the Judge of the District Court of the United States
for the Eastern District of Washington:

George M. Taggart, a citizen of the State of Wash-
ington residing in Chelan County in said State, brings
this his Bill against the Great Northern Railway Com-
pany, a corporation, organized and existing under the
laws of the State of Minnesota, having its principal place
of business in St. Paul in said State, and a citizen and
inhabitant of the said State.

Therefore your orator complains and says:

I.

That your orator is a citizen and resident of the State
of Washington residing in Chelan County in said State,
and the defendant, Great Northern Railway Company, is
a corporation organized and existing under the laws of
the State of Minnesota, having its principal place of
business in St. Paul in said State, and a citizen and in-
habitant of the said State.

II.

That your orator on or about September 17, 1907, filed in the United States Land Office at Waterville, Washington, his homestead entry upon

Lot Four (4) and the Southeast Quarter ($\frac{1}{4}$) of the Northwest Quarter ($\frac{1}{4}$) of Section Thirteen (13), Township Twenty-eight (28) North, Range Twenty-three (23) East, W. M., in Chelan County, Washington; that on said date said homestead entry was by the officials of said local Land Office duly allowed; that thereupon your orator entered and resided upon said land and improved the same by the cultivation of the soil, by the erection of farm buildings, by the planting of seventeen acres of fruit trees and the installation of a pumping system for irrigation purposes.

III.

That thereafter the United States issued to your orator a patent to said land conveying the full fee simple title in and to said land to your orator.

IV.

That your orator has ever since the 17th day of September, 1907, been in full, free and unobstructed possession of said land, has improved the same in the manner above set forth, and has at all times owned and claimed to own the full and unincumbered title to said land.

V.

That defendant is a railroad corporation and is now engaged in constructing a branch of its railroad from Wenatchee in said State of Washington North along the Columbia River and is threatening to trespass upon the

land of your orator above described and construct a railroad line over and across the said land of your orator, without the permission of your orator and without any right whatsoever; that defendant in constructing said railroad line threatens to make a deep cut across the middle of the land of your orator, ranging in depth from thirty to fifteen feet; that defendant further threatens to take possession of a right of way across the land of your orator to the width of two hundred feet; that if defendant is permitted to build said line as it threatens so to do, it will separate the farm of your orator in two parts by means of a deep cut; that it will take or destroy at least two hundred and twenty-five fruit trees belonging to your orator, take a strip of land two hundred feet wide by sixteen hundred and fifty feet long across the farm of your orator and interfere with and disturb the irrigation system upon said land.

VI.

That the value of the land which defendant threatens to take together with the damage which will accrue to your orator and to the land above described by reason of the acts which defendant threatens to perform greatly exceeds the sum of Three Thousand (\$3000) Dollars.

VII.

That your orator has no speedy and adequate remedy at law to relieve from the acts which the defendant threatens to perform.

WHEREFORE your orator prays that this Honorable Court issue an order directing defendant to show cause on a day certain why a preliminary injunction

should not issue *pendente lite* restraining said defendant, its agents, attorneys and employees from trespassing upon the land of your orator above described and from constructing said railroad line, as above set forth, across the land of your orator and upon the hearing of said order to show cause your orator prays a preliminary injunction restraining said defendant, its agents, attorneys, and employees from performing the acts above set forth issue, pending the determination of this cause upon its merits, and that upon the final hearing of this cause the Court decree that said defendant be permanently enjoined from committing the acts specified above; and your orator further prays that if prior to the time an order or decree is entered in this cause restraining said defendant from the acts above set forth the said defendant shall have committed said acts that this Court restrain the said defendant from operating or maintaining said line of railroad, and by a mandatory decree of this Court direct that said railroad be removed and your orator prays for such other general relief as to the Court may seem just and equitable.

To the end that your orator may obtain relief prayed for herein, he further prays that the Court do grant him process by subpoena directing the Great Northern Railway Company, a corporation, defendant named herein, to appear and answer, under oath, all of the allegations of the bill herein filed.

FRANCE & HELSELL,

Solicitors for Complainant.

State of Washington,
County of King,—ss.

Personally appeared before the undersigned this 16th day of November, 1912, the complainant in the above cause, who being first duly sworn, as to the truth of the allegations made in the above bill, says that he has read the foregoing bill, knows the contents thereof, and that the same is true of his own knowledge.

C. G. RIDOUT,

(Seal) Notary Public in and for the State of
Washington, residing at Seattle.

Indorsed: Bill in Equity.

Filed in the U. S. District Court, Eastern District of
Washington, Nov. 25, 1912.

WM. H. HARE, Clerk.

By S. M. RUSSELL, Deputy.

*In the United States District Court for the Eastern
District of Washington, Northern Division.*

No.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

NOTICE OF APPLICATION FOR PRELIMINARY
INJUNCTION.

To the Great Northern Railway Company, a corpo-
ration:

You will please take notice that upon Monday, December 9, 1912, at 10 o'clock A. M. the complainant in the above entitled action will apply to the above entitled Court at the Court Room of said Court in Spokane, Washington, for a preliminary injunction restraining defendant from performing the acts set forth in the attached application and the bill in equity on file herein.

FRANCE & HELSELL,
Solicitors for Complainant.

*In the United States District Court for the Eastern
District of Washington, Northern Division.*

No.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

APPLICATION FOR PRELIMINARY IN-
JUNCTION.

Comes now the complainant and moves the Court to issue a preliminary injunction in this cause restraining the defendant, Great Northern Railway Company, from building or attempting to build a railroad line across the land of your complainant, situated in Chelan County, Washington, and described as follows:

Lot Four (4) in Section Thirteen (13), Township Twenty-eight (28) North, Range Twenty-three (23) East, W. M.

This motion is based upon the bill of complaint on file herein and upon such affidavits as may hereafter be filed.

FRANCE & HELSELL,
Solicitors for Complainant.

Indorsed: Application for Preliminary Injunction and Notice.

Filed in the U. S. District Court, Eastern Dist. of Washington, Nov. 25, 1912.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern
Division.*

GEORGE M. TAGGART,
Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

IN EQUITY.

ANSWER OF THE GREAT NORTHERN RAILWAY
COMPANY, A CORPORATION, DEFENDANT,
TO THE BILL OF COMPLAINT.

This defendant now, and at all times hereafter, reserving any and all manner of benefit or advantage of exceptions that can or may be had or taken to the many errors, uncertainties and imperfections of the bill of complaint of the complainant herein, comes and answers thereto, or to such portions thereof as this defendant is advised are material to be answered, and says:

I.

Specifically answering the allegations of Paragraph I of said bill, this defendant admits that said complainant is a citizen and resident of the State of Washington, residing in Chelan County in said state, and that said defendant is a corporation, organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business in St. Paul in said state, and a resident and inhabitant of the State of Minnesota.

II.

Specifically answering the allegations of Paragraph II of said complaint, this defendant admits that said complainant, at the time therein stated, filed in the United States Land Office at Waterville, Washington, his homestead entry upon Lot Four (4) and the southeast quarter of the northwest quarter of Section Thirteen (13), Township Twenty-eight (28) North of Range Twenty-three (23) E., W. M., in Chelan County, Washington, and that said homestead entry was thereupon allowed by the officials of said local Land Office. Defendant admits that said complainant entered and resided upon said land and improved portions of the same by the cultivation of the soil, by the erection of farm buildings, and by the planting of several acres of fruit trees, and the installation of a pumping system for irrigation purposes.

III.

Defendant admits that thereafter, and on to-wit, February 3rd, 1912, the United States issued to said complainant a patent, describing all of said land; to so much of said paragraph as alleges that said patent conveyed

to complainant the full fee simple title to said land, this defendant says that it denies that said patent conveyed the full fee simple title, or any title to the strip of land hereinafter referred to and more particularly described, which defendant proposes to occupy across said Lot Four (4).

IV.

Specifically answering the allegations of Paragraph IV of said bill, this defendant admits that said complainant is now, and for some time past has been, in the possession of a portion of said land, but this defendant denies that it has any knowledge or information sufficient to form a belief, or any belief, as to whether said complainant has been in such possession since said 17th day of September, 1907, or as to when said complainant went into possession of said land. Defendant admits that said complainant has improved a portion of said land in the manner above set forth. To so much of said paragraph as alleges that said complainant has at all times owned and claimed to own the full and unencumbered title to said land, this defendant says that said complainant has never owned the full or unencumbered title, or any title, to the strip of land across said Lot, hereinafter described, and said defendant denies that it has any knowledge or information, sufficient to form a belief, as to whether said complainant has at all times, or ever claimed to own said strip, and therefore denies that said complainant has ever claimed to own the same.

V.

Specifically answering the allegations of Paragraph V of said bill, this defendant admits that it is a rail-

road corporation, and is now engaged in constructing a branch of its railroad from Wenatchee in the State of Washington, north along the Columbia River, and is threatening to go upon the strip of land hereinafter described, extending across said Lot Four (4) from the north side to the south side thereof, and to construct a railroad line upon portions of said strip, in the manner hereinafter more fully described and set forth. Defendant denies that it is threatening to trespass upon any land of said complainant, or that its construction of said railway will be without right. Defendant admits that in constructing said railroad line upon said strip, it will make a cut upon said strip, ranging in depth from five (5) to thirty (30) feet. Defendant admits that it threatens to take possession of a right of way upon said strip of land, about 180 feet in width, the limits of which are hereinafter specifically defined and described. To so much of said paragraph as alleges that any cut or trespass will be made by said defendant upon any land of said complainant, this defendant answering, says that it denies said allegations, and each thereof. Defendant admits that the construction of its line of railroad upon said strip, in the manner contemplated by it, and as hereinafter more fully described, will separate the farm of said complainant in two parts, by means of a cut. Defendant admits that the construction of its said railway upon said strip of land will necessitate the removal or destruction of about 200 fruit trees, planted upon said strip of land by said complainant, and alleges that said trees were planted by said complainant upon said strip, without right and without permission

or authority from this defendant. This defendant admits that it will construct said railroad upon a strip of land of the width hereinafter described, and about 1650 feet long across said Lot Four (4), and will interfere with and disturb certain portions of an irrigation system, which said portions of said irrigation system defendant alleges were constructed by said complainant, without right and without the permission or authority of this defendant, unless the same be removed by said complainant, prior to said construction. Defendant denies that it will take a strip of land two hundred (200) feet wide and 1650 feet long, or any land across the farm of said complainant. Said defendant alleges that no proceedings were ever had or taken by said complainant, whereby he, or any person in his behalf, acquired any right, title or interest in and to said strip of land, hereinafter described, upon which said defendant proposes to construct its said railway line.

Further answering this defendant says that it is a railroad corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business and office in the City of St. Paul in said state; that it has filed its articles of incorporation with the Secretary of State of the State of Washington, and has appointed a resident agent therein, all pursuant to the statute in such case made and provided, and is, and at all times herein mentioned has been, duly qualified, and authorized to transact business as a railway company in the State of Washington. That it is organized for the construction of a railway line and railway lines.

That in the year 1906, the Washington and Great Northern Railway Company was a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and in all respects fully authorized to locate and construct lines of railway in said state; that during such year said Washington and Great Northern Railway Company duly surveyed and located a line of railway from Wenatchee northerly, along the west bank of the Columbia River to the mouth of the Okanogan River, and northerly therefrom to the international boundary line, between the United States and the Dominion of Canada. That said line so surveyed and located, crossed Lot Four (4), Section Thirteen (13), Township Twenty-eight (28) North of Range Twenty-three (23) E., W. M., in a northerly and southerly direction. That said Lot Four (4) was at the time of said survey and location, and on January 2nd, 1907, the date of the filing of the maps of said location, hereinafter referred to, vacant and unoccupied public land of the United States. That the line so surveyed and located by said Washington and Great Northern Railway Company was duly adopted by resolution of the Board of Directors thereof, as the definite location of said line of railway. That said Washington and Great Northern Railway Company did, prior to the filing of its map of definite location, hereinafter referred to, file in the office of the Secretary of the Interior of the United States, a copy of its articles of incorporation and due proofs of its organization under the same; that on the 2nd day of January, 1907, said Washington and Great Northern Railway Company filed in the Public

Land Office of the United States at Waterville, in the State of Washington, maps showing the definite location of said railway line, as surveyed and located. That the center line of said railway, as surveyed and located across said Lot Four (4), Section Thirteen (13), Township Twenty-eight (28) North of Range Twenty-three (23) E., W. M., and as shown upon said map of definite location, is described as follows, to-wit:

Commencing at a point in the south line of Section Thirteen (13), Township Twenty-eight (28) North, Range Twenty-three (23) East, Willamette Meridian, three hundred thirty-three and two-tenths (333.2) feet east, as measured along said south line of Section Thirteen (13) from the southwest corner of said Section Thirteen (13); thence northeasterly on a two degree (2°) curve to the left, consuming a total angle of two degrees (2°) fifty-two minutes ($52'$), a distance of one hundred forty-three (143) feet; thence northeasterly on a straight line for a distance of thirty-four hundred eighty-two and eight-tenths (3482.8) feet tangent at its point of beginning to said two degree (2°) curve at its point of ending; said straight line if produced making an included northeasterly angle forty-five degrees (45°) thirty-five minutes ($35'$) with said south line of said Section Thirteen (13); thence northeasterly on a spiral curve to the left through an angle of nine degrees no minutes ($9^{\circ} 0'$) a distance of three hundred (300) feet with a radii varying from infinity at its point of beginning to nine hundred fifty-five and thirty-seven hundredths (955.37) feet at its point of ending and being tangent at its point of beginning to

last described straight line at its point of ending; thence on a six degree (6°) curve to the left through an angle of six degrees (6°) no minutes ($0'$), a distance of one hundred (100) feet, being tangent at its point of beginning to last described spiral curve at its point of ending; thence on a spiral curve to the left through an angle of nine degrees (9°) no minutes ($0'$), a distance of three hundred (300) feet with radii varying from nine hundred fifty-five and thirty-seven hundredths (955.37) feet at its point of beginning to infinity at its point of ending; thence northeasterly on a straight line for a distance of three hundred eighty-eight (388) feet, being tangent at its point of beginning to last described spiral curve at its point of ending; thence northeasterly on a spiral curve to the right through an angle of four degrees (4°), a distance of two hundred (200) feet with radii varying from infinity at its point of beginning to fourteen hundred thirty-two and sixty-nine hundredths (1432.69) feet at its point of ending and being tangent at its point of beginning to last described straight line at its point of ending; thence on a four degree (4°) curve to the right through an angle of thirteen degrees (13°), a distance of three hundred twenty-five (325) feet and being tangent at its point of beginning to last described spiral curve at its point of ending; thence on a spiral curve to the right through an angle of four degrees (4°), a distance of two hundred (200) feet with radii varying from fourteen hundred thirty-two and sixty-nine hundredths (1432.69) feet at its point of beginning to infinity at its point of ending and being tangent at its point of beginning to last de-

scribed four degree (4°) curve at its point of ending; thence northeasterly on a straight line a distance of three hundred seven (307) feet to a point in the east line of Lot One (1), Section Thirteen (13), Township and Range aforesaid, being also west line of Indian Allotment No. 20, nine hundred fifty-five and one-tenth (955.1) feet distant southerly as measured along east line of Lot One (1) from the northeast corner of said Lot One (1); the aforesaid last course of said center line making a southwesterly angle of thirty-four degrees (34°) thirty minutes ($30'$), with said east line of said Lot One (1), said center line being shown colored red upon the blue print map, marked "Exhibit A," hereunto annexed, which is hereby referred to and made a part of this answer.

That said maps of definite location were on the 23rd day of March, 1908, duly approved by the Secretary of the Interior of the United States, and were thereupon returned by said Secretary of the Interior to the United States Land Office at Waterville; that the register and receiver of said United States Land Office duly received said maps, and noted upon the maps in said office the said located line of railway of said Washington and Great Northern Railway Company, and said defendant craves leave to refer to said map when produced; that by said proceedings the Washington and Great Northern Railway Company duly acquired a perfect grant, right and title to a strip of land two hundred (200) feet in width across said Lot Four (4), Section Thirteen (13), Township Twenty-eight (28), North of Range Twenty-three (23) East, being one hundred (100) feet

wide on each side of the center line of said railroad, as located across said Lot Four (4), and as hereinbefore described.

That in the month of July, 1907, said Washington and Great Northern Railway Company duly transferred and conveyed to the defendant herein, by its deed in writing, all of its right, title and interest in and to the said right of way and railway line, and that said Great Northern Railway Company then became and has ever since been the owner thereof; that said deed was, on the 9th day of September, 1908, filed for record with the Auditor of Chelan County by said defendant, and on said date was recorded by said Auditor in Book 79 of Deeds at page 444, Records of said county.

That in the years 1908 and 1909 said Great Northern Railway Company, as the owner of said located line and right of way, revised the above mentioned survey and location thereof, and on the 31st day of July, 1909, said Great Northern Railway Company, having theretofore filed with the Secretary of the Interior of the United States a copy of its charter and articles of incorporation and due proofs of its organization under the same, filed with the register of the United States Land Office at Waterville, maps of such revision and of amended definite location of said railway line, and said defendant craves leave to refer to said map, when produced. That said located line of railway, as re-surveyed by said Great Northern Railway Company, crossed said Lot Four (4), Section Thirteen (13), Township Twenty-eight (28), North of Range Twenty-three (23) E., W. M., in a northerly and southerly direction; that the

center line of said railway, as revised and re-surveyed across said Lot Four (4) and as shown upon said map of amended definite location, is described as follows, to-wit:

Commencing at a point in the south line of Section Thirteen (13), Township Twenty-eight (28) North, Range Twenty-three (23) East, Willamette Meridian, two hundred sixty-six and nine-tenths (266.9) feet east as measured along said south line of said Section Thirteen (13) from the southwest corner of said Section Thirteen (13); thence northeasterly on a one degree (1°) curve to the left consuming a total angle of five degrees (5°) forty minutes ($40'$), a distance of five hundred sixty-six and five-tenths (566.5) feet, tangent to said curve at its intersection with said south line of Section Thirteen (13), making a northeasterly angle of thirty-nine degrees (39°) forty-one minutes ($41'$) with said south line of Section Thirteen (13); thence northeasterly on a straight line for a distance of three thousand nine and nine-tenths (3009.9) feet, being tangent at its point of beginning to said one degree (1°) curve at its point of ending; thence northeasterly on a spiral curve to the left through a total angle of four degrees (4°) no minutes ($0'$) a distance of two hundred (200) feet with radii varying from infinity at its point of beginning to fourteen hundred thirty-two and sixty-nine hundredths (1432.69) feet at its point of ending; thence on a four degree (4°) curve to the left through an angle of sixteen degrees (16°) twenty-four minutes ($24'$) a distance of four hundred ten (410) feet and being tangent at its point of beginning to last described spiral

at its point of ending; thence on a spiral curve to the left through an angle of four degrees (4°) and no minutes ($0'$) a distance of two hundred (200) feet with radii varying from fourteen hundred thirty-two and sixty-nine hundredths (1432.69) feet at its point of beginning to infinity at its point of ending and being tangent at its point of beginning to last described four degree (4°) curve at its point of ending; thence northeasterly on a straight line a distance of three hundred fifty-five (355) feet, being tangent at its point of beginning to last described spiral curve at its point of ending; thence northeasterly on a spiral curve to the right through an angle of four degrees (4°) no minutes ($0'$), a distance of two hundred (200) feet with radii varying from infinity at its point of beginning to fourteen hundred thirty-two and sixty-nine hundredths (1432.69) feet at its point of ending and being tangent at its point of beginning to last described straight line at its point of ending; thence on a four degree (4°) no minute ($0'$) curve to the right through an angle of thirteen degrees (13°) no minutes ($0'$), a distance of three hundred twenty-five (325) feet and being tangent at its point of beginning to last described spiral curve at its point of ending; thence on a spiral curve to the right through an angle of four degrees (4°) no minutes ($0'$) a distance of two hundred (200) feet with radii varying from fourteen hundred thirty-two and sixty-nine hundredths (1432.69) feet at its point of beginning to infinity at its point of ending and being tangent at its point of beginning to last described four degree (4°) no minute ($0'$) curve at its point of ending; thence northeasterly on a straight line

a distance of three hundred thirty-five and eight-tenths (335.8) feet to a point in the east line of Lot One (1), Section Thirteen (13), Township and Range aforesaid, being also west line of Indian Allotment No. 20 nine hundred thirty-seven and nine-tenths (937.9) feet distant southerly as measured along east line of Lot One (1) from the northeast corner of said Lot One (1); the aforesaid last course of said center line making a south-westerly angle of thirty-four degrees (34°) twenty-six minutes (26') with said east line of said Lot One (1), said center line being shown colored white upon blue print map, marked "Exhibit A," which is hereunto annexed and hereby referred to and made a part hereof.

That during the month of February, 1912, said Great Northern Railway Company filed in the District Land Office of the United States at Waterville, a release and relinquishment to the United States of all its right, title and interest in and to the right of way acquired by it, as grantee of said Washington and Great Northern Railway Company, as aforesaid, excepting and excluding, however, from said release and relinquishment any and all portions of said right of way situated within one hundred (100) feet on either side of the center line of the railway of said Great Northern Railway Company, as shown upon said map of amended definite location, and as hereinbefore described, which release and relinquishment, by its terms, became effective upon the approval by the Secretary of the Interior of said map of amended definite location of this defendant, Great Northern Railway Company.

That said map of amended definite location, filed by

said Great Northern Railway Company on July 31st, 1909, as aforesaid, was, on the 13th day of July, 1912, duly approved by the Secretary of the Interior of the United States.

That the center line shown on said map of definite location filed by the said Washington and Great Northern Railway Company, is located easterly of the center line shown on said map of amended definite location filed by said Great Northern Railway Company across said Lot Four (4). The maximum distance between said center lines is thirteen and two-tenths (13.2) feet, according to measurements, from the northeast corner of Lot One (1), Section Thirteen (13), Township Twenty-eight (28) North of Range Twenty-three (23) E., W. M., and twenty-three and seven-tenths (23.7) feet, according to measurements from the southwest corner of said Section Thirteen (13), said points being the nearest northerly and southerly, respectively, from said Lot Four (4), to which said center lines are tied on said maps. The relative positions of said center lines are illustrated on said blue print map, hereunto annexed, marked "Exhibit A," which is hereby referred to and made a part of this answer.

That this defendant is, and at all times since the 2nd day of January, 1907, has been, the owner of a strip of land about one hundred and eighty (180) feet in width across Lot Four (4), Section Thirteen (13), Township Twenty-eight (28) North of Range Twenty-three (23) E., W. M., ranging from approximately eighty (80) to ninety (90) feet in width, upon the westerly side, and being one hundred (100) feet wide upon the easterly side

of the center line of the Great Northern Railway Company, as shown on its said map of amended definite location, and as hereinbefore described, being all that part of a strip of land one hundred (100) feet wide on each side of the center line shown on map of definite location, filed by the Washington and Great Northern Railway Company on January 2nd, 1907, located and remaining within the lines of a strip one hundred (100) feet wide on each side of the center line shown on the map of amended definite location, filed by the Great Northern Railway Company on July 31, 1909. That the only land in said Lot Four (4) which said defendant proposes to occupy in the construction, maintenance or operation of its railroad across said Lot Four (4) is said strip of land, and that said defendant will, unless restrained by order of this Court, proceed to enter upon said strip and to construct, maintain and operate its line of railway thereon.

VI.

Specifically answering the allegations of Paragraph VI of said bill, this defendant says that it denies that the value of the strip of land which this defendant proposes to occupy, as aforesaid, exceeds the sum of three thousand dollars (\$3000), or is of any greater value than seven hundred and fifty dollars (\$750.00). Defendant denies that any damage will accrue to said complainant, or to said land, by reason of the construction, maintenance or operation of the defendant's line of railroad upon the strip of land hereinbefore described, which it proposes to occupy across said Lot Four (4)

VII.

Specifically answering the allegations of Paragraph VII of said bill, defendant says that it denies that complainant has no speedy and adequate remedy at law, to relieve from the acts which this defendant threatens to perform.

VIII.

Said defendant further answering said bill alleges that it, the said defendant, is now engaged in the construction of its line of railroad, working from the Okanogan River southerly in the direction of Wenatchee, and has proceeded with the construction of its roadbed up to and within a short distance of the strip of land hereinbefore described; that it has a large force of men at work in excavating, filling and constructing said roadbed, and that it is spending large sums of money in making said road; that any interference with such construction of said defendant will cause said defendant irreparable damage; that the construction of said roadbed across said Lot Four (4), and for more than four (4) miles beyond said Lot Four (4) is of such a nature that a steam shovel is necessary to be used in excavating, filling and making said roadbed; that it will be necessary for said defendant within two weeks from the date hereof, to enter upon said strip of land with said steam shovel, and to proceed with the construction of said railway, and that it cannot proceed with said work of construction beyond said Lot Four (4), until it has completed the construction of said roadbed across the strip of land hereinbefore described on said Lot Four (4); that the said defendant is endeavoring with all

haste to complete said roadbed, and to construct thereon the said line of railway of said defendant, so that the same will be constructed and in readiness to serve the territory contiguous and lying adjacent to said line of railway; that the cost of the operation of said steam shovel and the wages of the men used in operating the same and in connection therewith, and the other expenses of constructing said roadbed, amount to the sum of three hundred dollars (\$300.00) per day, and that if the said work of construction is delayed by the issuance of an injunction herein, damage will be done to said defendant in the sum of two hundred and fifty dollars (\$250.00) per day. That not only will said damage accrue to said defendant, but that much damage will be done to the community which said defendant proposes to serve with its said railroad, and to the territory contiguous to said line of railroad; that the country which will be served by said line of railroad has at present no railroad transportation facilities and no adequate transportation facilities of any kind, and said defendant alleges that the public has an interest in the speedy construction of said railway, and that the said defendant should not be impeded in said construction across said strip of land, hereinbefore described, by any act of said complainant, or any preliminary or permanent injunction granted herein.

IX.

This defendant hereby offers to file herein, a bond with good and sufficient sureties, to be approved by this Court, conditioned that it will indemnify and reimburse said complainant for any and all damages which may

accrue to said complainant, by reason of the construction by said defendant of its line of railroad upon the said strip of land, hereinbefore described, in case it shall be finally adjudged that said construction is wrongful, and with such other conditions as the above entitled Court may consider requisite and necessary to protect said complainant from any damages which may accrue to him, by reason of the construction of said railroad upon said strip of land.

X.

This defendant denies any and all manner of unlawful acts, wherein it is by the said bill of complaint charged, without this, that there is any other matter, cause or thing in said complainant's bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge or belief of this defendant, all which matters and things this defendant is willing and ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

GREAT NORTHERN RAILWAY COMPANY,

By F. V. BROWN,

CHARLES S. ALBERT,

THOMAS BALMER,

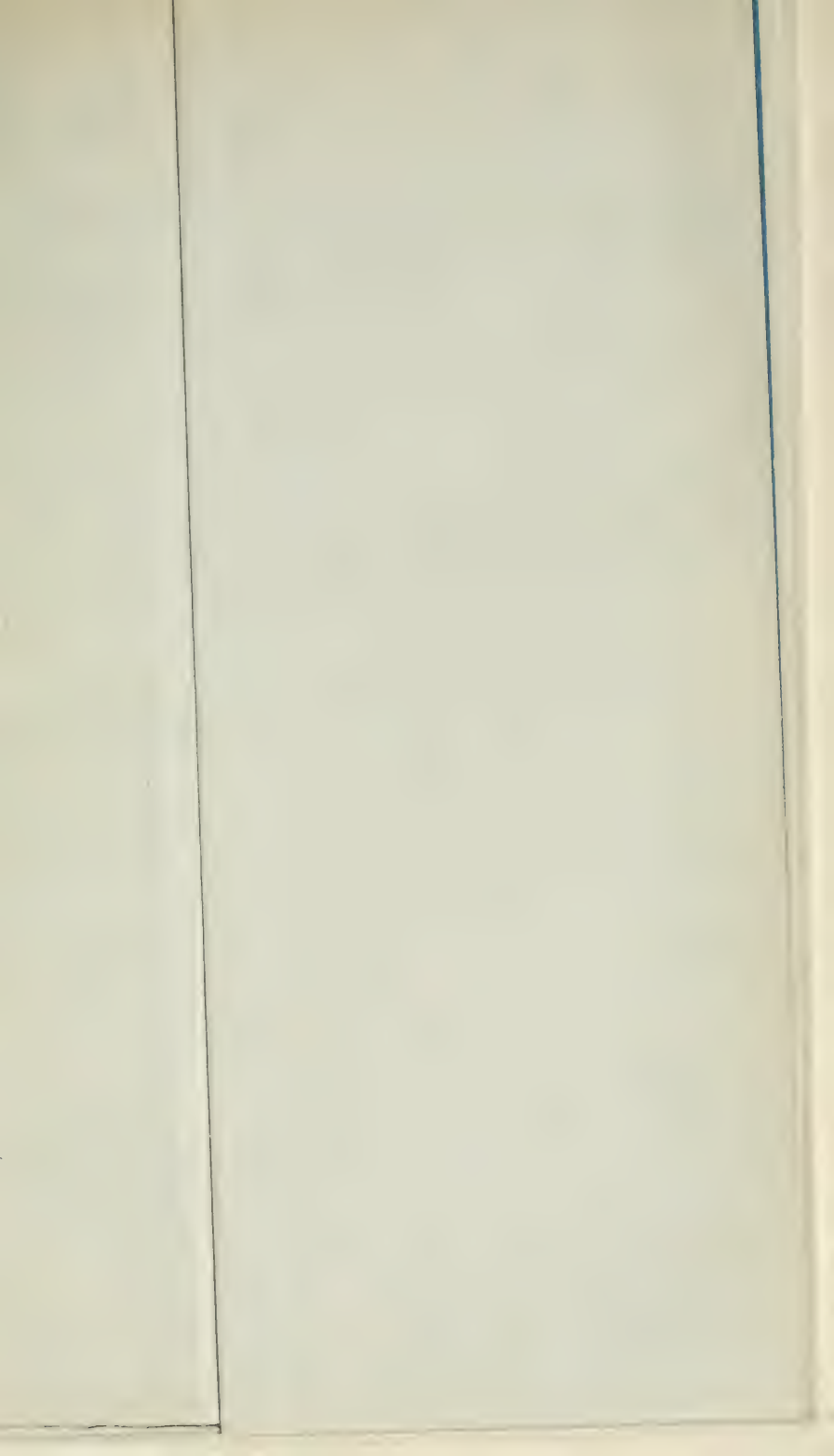
F. V. BROWN,

Its Solicitors.

CHARLES S. ALBERT,

THOMAS BALMER,

Solicitors for Defendant.



accrue to said complainant, by reason of the construction by said defendant of its line of railroad upon the said strip of land, hereinbefore described, in case it shall be finally adjudged that said construction is wrongful, and with such other conditions as the above entitled Court may consider requisite and necessary to protect said complainant from any damages which may accrue to him, by reason of the construction of said railroad upon said strip of land.

X.

This defendant denies any and all manner of unlawful acts, wherein it is by the said bill of complaint charged, without this, that there is any other matter, cause or thing in said complainant's bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge or belief of this defendant, all which matters and things this defendant is willing and ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly prays to be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained.

GREAT NORTHERN RAILWAY COMPANY,

By F. V. BROWN,

CHARLES S. ALBERT,

THOMAS BALMER,

F. V. BROWN,

Its Solicitors.

CHARLES S. ALBERT,

THOMAS BALMER,

Solicitors for Defendant.

LD 01

LD 01

P. O. Address: Great Northern Passenger Station,
Spokane, Spokane County, Washington.

Indorsed: Answer.

Filed in the U. S. District Court, Eastern District of
Washington, Dec. 19, 1912.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern
Division.*

GEORGE M. TAGGART,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

It is hereby stipulated, that the answer of the defendant to the bill of complaint herein need not be verified, and answer under oath is hereby expressly waived, as is also the attestation of the answer of said defendant by affixing the corporate seal of said defendant to said answer, and the attestation of the signature of the said defendant is also waived.

Dated this 13th day of December, 1912.

FRANCE & HELSELL,
Solicitors for Complainant.
F. V. BROWN,
CHARLES S. ALBERT,
THOMAS BALMER,
Solicitors for Defendant.

Indorsed: Stipulation.

Filed in the U. S. District Court, Eastern Dist. of
Washington, Dec. 19, 1912.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

*In the United States District Court, for the Eastern
District of Washington, Northern Division.*

No.

GEORGE M. TAGGART,

Complainant,

v.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

STIPULATION FOR SUBMISSION OF CAUSE
UPON AGREED STATEMENT OF FACTS.

IT IS HEREBY STIPULATED AND AGREED, by
and between the parties hereto, by their respective
solicitors, that the application of the complainant for a
temporary injunction may be submitted to the above en-
titled Court upon the following facts, which are hereby
admitted and agreed to be true:

I.

That complainant is a citizen and resident of the State
of Washington, residing in Chelan County in said state,
and the defendant is a corporation organized and ex-
isting under the laws of the State of Minnesota, having
its principal place of business at St. Paul in said state,
and a citizen and inhabitant of said State of Minnesota.

II.

That complainant, on or about September 17, 1907, filed in the United States Land Office at Waterville, Washington, his homestead entry upon

Lot Four (4) and the Southeast Quarter of the Northwest Quarter of Section Thirteen (13), Township Twenty-eight (28) North, Range Twenty-three (23) East, W. M., in Chelan County, Washington.

That on said date said homestead entry was by the officials of said local Land Office duly allowed; that thereupon complainant entered and resided upon said land, and improved a portion of said Lot Four by the cultivation of the soil, by the erection of farm buildings, by the planting of seventeen acres of fruit trees, and the installation of a pumping system for irrigation purposes.

III.

That thereafter, and on February 3, 1912, the United States issued to said complainant a patent describing all of said land, and making no reservation of any railroad right of way thereon.

IV.

That complainant has, ever since the 17th day of September, 1907, been in possession of said land, and has improved the same in the manner above set forth.

V.

That defendant is, and at all times herein mentioned has been, a railway corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Minnesota, having its principal place of business and office at the City of St. Paul in said state;

that it has filed its articles of incorporation with the Secretary of State of the State of Washington, and has appointed a resident agent therein, all pursuant to the statute in such case made and provided, and is, and at all times herein mentioned has been, duly qualified and authorized to transact business as a railway company in the State of Washington.

VI.

That in the year 1906 the Washington and Great Northern Railway Company was a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and was in all respects fully authorized to locate and construct lines of railway in said state; that during such year said Washington and Great Northern Railway Company duly surveyed and located a line of railway from Wenatchee northerly along the west bank of the Columbia River, to the mouth of the Okanogan River, and northerly therefrom to the international boundary line between the United States and the Dominion of Canada. That said line, so surveyed and located, crossed Lot 4, Section 13, Township 28, North of Range 23 E., W. M., in a northerly and southerly direction. That said Lot 4 was, at the time of said survey and location, and on January 2, 1907, the date of the filing of the maps of said location hereinafter referred to, vacant and unoccupied public lands of the United States. That the line so surveyed and located by said Washington and Great Northern Railway Company was duly adopted by resolution of the Board of Directors thereof, as the definite location of said line of railway; that said Washington & Great

Northern Railway Company did, prior to the filing of its map of definite location, hereinafter referred to, file in the office of the Secretary of the Interior of the United States, a copy of its articles of incorporation, and due proofs of its organization under the same; that on the 2nd day of January, 1907, said Washington & Great Northern Railway Company filed in the Public Land Office of the United States at Waterville, in the State of Washington, maps showing the definite location of said railway line as surveyed and located. The section of said map crossing said Lot 4, Section 13, Township 28 N., R. 23 E., W. M., is hereunto annexed, marked "Exhibit A," and is hereby referred to and made a part of this stipulation.

VII.

That said maps of definite location were, on the 23d day of March, 1908, duly approved by the Secretary of the Interior of the United States, in the form endorsed upon said Exhibit A, and were thereupon returned by said Secretary of the Interior to the United States Land Office at Waterville; that the register and receiver of said United States Land Office duly received said maps and noted upon the plats in said office the said located line of railway of said Washington & Great Northern Railway Company.

VIII.

That in the month of July, 1907, said Washington & Great Northern Railway Company duly transferred and conveyed to the defendant herein, by its deed in writing, all of its right, title and interest in and to the said right of way and railway line, and that said Great Northern Railway Company then became, and has ever since been

the owner thereof. That said deed was, on the 9th day of September, 1908, filed for record with the Auditor of Chelan County by said defendant, and on said date was recorded by said auditor in Book 79 of Deeds, at page 444, Records of said county.

IX.

That in the years 1908 and 1909, said Great Northern Railway Company, as the owner of said located line and right of way, revised the above mentioned survey and location thereof, and on the 31st day of July, 1909, said Great Northern Railway Company, having theretofore filed with the Secretary of the Interior of the United States, a copy of its charter and articles of incorporation, and due proofs of its organization under the same, filed with the Register of the United States Land Office at Waterville, maps of such revision and of amended definite location of said railway line. A copy of the section of said map crossing said Lot 4 is hereunto annexed, marked "Exhibit B," and is hereby referred to and made a part of this stipulation.

X.

That on January 12, 1912, the Commissioner of the United States General Land Office directed the Register and Receiver of the local Land Office at Waterville, to call the attention of said Great Northern Railway Company to the fact that said company had not filed, with its said map of amended definite location, a relinquishment, under seal, of all rights under the original approval of said map filed by said Washington & Great Northern Railway Company, as aforesaid, as to the portions thereof amended in said Great Northern Railway

Company's map of amended definite location, as provided in Section 19 of the circular of said General Land Office issued on May 21, 1909, reading as follows:

“When the railroad is constructed, an affidavit of the engineer and certificate of the president must be filed in the local office, in duplicate, for transmission to the General Land Office. No new map will be required except in case of deviations from the right of way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the amended survey and amended definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior.”

XI.

That during the month of February, 1912, said Great Northern Railway Company filed in the District Land Office of the United States at Waterville, a release and relinquishment to the United States, of all its right, title and interest in and to the right of way acquired by it, as grantee of said Washington & Great Northern Railway Company as aforesaid, with certain exceptions, a copy of which relinquishment is hereunto annexed, marked “Exhibit C,” and hereby referred to and made a part of this stipulation.

XII.

That said map of amended definite location, filed by said Great Northern Railway Company on July 31, 1909, as aforesaid, was, on the 13th day of July, 1912, duly approved by the Secretary of the Interior of the United States.

XIII.

That said Washington & Great Northern Railway Company was never called upon or requested by said Secretary of the Interior, or by the Register or Receiver of the United States Land Office at Waterville, to file any profile showing the elevations and depressions at which its said line of railway described in said map of definite location, filed by it on January 2, 1907, as aforesaid, crossed the public lands of the United States shown thereon, and that said defendant Great Northern Railway Company was never called upon or requested by the Secretary of the Interior, or by such register or receiver, to file any profile showing the elevations and depressions at which its said line of railway shown on said map of amended definite location, crossed the public lands of the United States shown thereon, until the 17th day of November, 1910, when the Secretary of the Interior requested the Register and Receiver of the Land Office at Waterville to notify said defendant, that, since the line of its railway as described in said map of amended definite location crossed certain lands suitable for power sites, which had been temporarily withdrawn from entry or sale, said Great Northern Railway Company would be required to file a profile showing the elevations and depressions at which the line of its said

railway crossed such lands; that on May 4, 1911, said defendant filed a profile in the United States Land Office at Waterville, showing the elevations and depressions of its entire line, from its crossing of the Okanogan River to its junction with the main line of said defendant near Wenatchee. That said defendant has never filed any other maps with reference to said right of way across said Lot 4, than those referred to in this stipulation.

XIV.

That at all times since November 4, 1898, the regulations promulgated by the General Land Office of the United States, and approved by the Secretary of the Interior, under the Act of Congress approved March 3, 1875, entitled, "An act granting to railroads the right of way through the public lands of the United States," have contained the following provisions:

"The word profile as used in this act is understood to intend a map of alignment. All such maps and plats of station grounds are required by the act to be filed with the register of the land office for the district where the land is located. If located in more than one district, duplicate maps and field notes need be filed in but one district, and single sets in the others. The maps must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey of the line of route or of the station grounds."

XV.

That the center line shown on said map of definite location, filed by the Washington & Great Northern Railway Company is located easterly of the center line

shown on said map of amended definite location filed by said Great Northern Railway Company across said Lot 4. The maximum distance between said center lines is 13.2 feet, according to measurements from the Northeast corner of Lot 1, Section 13, Township 28 N., R. 23 E., W. M., and 23.7 feet according to measurements from the Southwest corner of said Section 13, said points being the nearest, northerly and southerly, respectively, from said Lot 4, to which said center lines are tied on said maps. The relative positions of said center lines are illustrated on the blue print map hereunto annexed, marked "Exhibit D," which is hereby referred to and made a part of this stipulation.

XVI.

That the only land in said Lot 4 which said defendant proposes to occupy in the construction, maintenance or operation of its railroad across said Lot 4, is a strip of land about 180 feet in width, being all that part of a strip of land 100 feet wide on each side of the center line shown in the map of definite location filed January 2, 1907, located and remaining within the lines of a strip 100 feet wide on each side of the center line shown on the map of amended definite location filed July 31, 1909. That said defendant will, unless restrained by the order of this Court, proceed to enter upon said strip, and to construct, maintain and operate its line of railway thereon.

XVII.

That no part of the twenty-mile section of defendant's railroad crossing said Lot 4, has been completed.

XVIII.

That said defendant is now engaged in the construction of its line of railroad, working from the Okanogan River in the direction of Wenatchee, and has proceeded with the construction of its roadbed up to and within a short distance of the strip of land hereinbefore described. That the construction of said railroad upon said strip of land will necessitate the removal or destruction of about 225 fruit trees planted upon said strip by said complainant, and will require the readjustment of certain portions of an irrigation system constructed by said complainant upon said land. That plaintiff's claim that said acts of defendant complained of in this action will result in damage to him exceeding \$3,000.00 is made in good faith. That the facts constituting what defendant believes to be its equities opposed to the issuing of a temporary injunction herein may be presented by affidavits upon the hearing of the application for a temporary injunction.

XIX.

If the order of the Court upon the application for temporary injunction shall be in favor of defendant, it is agreed that evidence may be introduced to enable the Court in its order to define and describe, by metes and bounds, the land which defendant is entitled to occupy with its said railroad across said Lot 4.

All objections to the competency, relevancy or materiality of any fact hereinbefore admitted, are reserved. Complainant reserves the right upon reasonable notice

to file affidavits not inconsistent with this stipulation.

Dated, this 13th day of December, 1912.

FRANCE & HELSELL,

Solicitors for Complainant.

F. V. BROWN,

CHARLES S. ALBERT,

THOMAS BALMER,

Solicitors for Defendant.

Indorsed: Stipulation.

Filed in the U. S. District Court, Eastern District of
Washington, Dec. 21, 1912.

WM. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

EXHIBIT "C".

F 279784

B.

W. E. L.

4-207

DEPARTMENT OF THE INTERIOR,

General Land Office,

Washington, D. C.

November 22, 1912.

I hereby certify that the annexed copy of relinquish-
ment is a true and literal exemplification from the orig-
inal paper on file in this office.

IN TESTIMONY WHEREOF I have hereunto sub-
scribed my name and caused the seal of this office to be
affixed, at the City of Washington, on the day and year
above written.

S. V. PROUDFIT,

(SEAL)

Acting Commissioner of the General
Land Office.

FILED	010100
Feb. 19, 1912.	010101
W. F. HAYNES, Register.	010102
	010103

WHEREAS, the Secretary of the Interior, on the 23rd day of March, 1908, approved, under and pursuant to the provisions of the Act of Congress of March 3rd, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States," maps showing the line of railway of the Washington and Great Northern Railway Company from a point in the middle of the Okanogan River in Section Five (5), Township Thirty-one (31) North, Range Twenty-five (25) East of the Willamette Meridian, thence along the Columbia River to a junction with the Great Northern Railway Company's constructed line of railway in the Southeast Quarter (SE $\frac{1}{4}$) of Section Twenty-eight (28), Township Twenty-three (23) North, Range Twenty (20) East, near the mouth of the Wenatchee River, in the State of Washington, and

WHEREAS, the Great Northern Railway Company, grantee of the Washington and Great Northern Railway Company, revised and relocated the said line of railway, the maps whereof were approved as aforesaid, and on the 31st day of July, 1909, filed in the United States District Land Office at Waterville, Washington, for the approval of the Secretary of the Interior, under the Act aforesaid, maps of said revised and relocated line, and

WHEREAS, the Secretary of the Interior, as a condition precedent to the approval under the Act afore-

said of the maps of said revised and relocated line requires the Great Northern Railway Company to release and relinquish to the United States the right of way pertaining to the line of original location shown on the maps approved by him on the 23rd day of March, 1908, as aforesaid.

NOW THEREFORE, the Great Northern Railway Company, in consideration of the premises, does hereby release and relinquish to the United States all its right, title and interest in and to the right of way pertaining to the line of railway between the points aforesaid shown upon the maps filed by the Washington and Great Northern Railway Company and approved by the Secretary of the Interior on the 23rd day of March, 1908, as aforesaid, acquired under and by virtue of said approval, excepting and excluding, however, any and all of such right of way that is or may be situated within the limits of the right of way pertaining to the revised and relocated line of said Company's railway shown upon the maps thereof filed in the United States District Land Office at Waterville, Washington, on the 31st day of July, 1909.

It is expressly understood that this release and relinquishment shall not take effect until the maps of the said railway company's revised and relocated line are approved by the Secretary of the Interior.

IN WITNESS WHEREOF, the Great Northern Railway Company has caused this instrument to be exe-

cut by its proper officers, and its corporate seal to be hereunto affixed this 6th day of February, 1912.

GREAT NORTHERN RAILWAY COMPANY,
(SEAL) By L. W. HILL, President.

L. E. KATZENBACH, Secretary.

Signed, sealed and delivered in presence of:

H. H. PARKHANE,
VINCENT C. JENNY.

State of Minnesota,
County of Ramsey,—ss.

On this 10th day of February, A. D., 1912, before me personally appeared L. W. Hill, to me known to be the president of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein named, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year first above written.

EARLE W. McELROY,
(SEAL) Notary Public, Ramsey County, Minn.
My Commission expires April 14, 1918.

Endorsements: Exhibit "C".

Filed in the U. S. District Court for the Eastern District of Washington, December 21, 1912.

W. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

*In the United States District Court for the Eastern
District of Washington, Northern Division.*

No.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by
and between the parties hereto that those maps de-
scribed in the stipulation of facts heretofore entered into
on the 13th day of December, 1912, in the above entitled
action, described as Exhibits "A", "B", "C" and "D",
may be introduced in evidence at the hearing upon an
application for a preliminary injunction as Exhibits,
bearing such numbers and need not be attached to said
stipulation as therein stated.

FRANCE & HELSELL,

F. V. BROWN,

CHARLES S. ALBERT and

THOMAS BALMER.

Indorsed: Stipulation.

Filed in the U. S. District Court, Eastern District of
Washington, Dec. 21, 1912.

WM. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

Great Northern Railway Company, Appellee. 43
In the United States District Court for the Eastern
District of Washington, Northern Division.

No.

GEORGE M. TAGGART,

Complainant,

v.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

AFFIDAVIT OF A. M. ANDERSON.

State of Washington,
County of Spokane,—ss.

A. M. ANDERSON, being first duly sworn, deposes and says: That he is, and for eight years last past, has been the right of way agent of the Great Northern Railway Company at Spokane, Washington. That as such right of way agent he has purchased for said railway company the greater portion of the right of way necessary for its line of railroad from Wenatchee north to Pateros. That he is acquainted with the location, characteristics and value of Lot 4, Section 13, Township 28 N., R. 23 E., W. M., that he has purchased numerous parcels of land in the vicinity of said Lot 4, and is familiar with the market value of real estate of the character of said Lot 4 in that vicinity. That the fair market value of a strip of land across said Lot 4, 100 feet in width on each side of the center line of the Great Northern Railway Company, including the improvements thereon, and all damages to the remainder of said Lot 4, by reason of the construction of a railroad thereon in

the manner contemplated by said defendant, does not exceed the sum of \$1,000.00.

A. M. ANDERSON.

Subscribed and sworn to before me this 17th day of December, 1912.

THOMAS BALMER,
Notary Public in and for the State of Wash-
(Seal.) ington, residing at Spokane.

*In the District Court of the United States for the
Eastern District of Washington, Northern
Division.*

GEORGE M. TAGGART,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,
Defendant.

AFFIDAVIT OF M. J. C. ANDREWS.

State of Washington,
County of Spokane,—ss.

M. J. C. ANDREWS, being first duly sworn, on oath deposes and says that he is, and for about four years last past has been employed by the Great Northern Railway Company as engineer in charge of the construction of its line of railroad from Wenatchee, northerly along the west bank of the Columbia River to Pateros, in Okanogan County. That he is familiar with all the details of said construction, and the amount of work done and required to be done by said defendant in building its said railroad line.

That the defendant, Great Northern Railway Company, is now engaged in constructing its said line of railway, working from Pateros near the Methow River, in the direction of Wenatchee in Chelan County, at the junction of said line with the main line of said defendant, Great Northern Railway Company. That said railroad line is built through an uneven and hilly country, following the west bank of the Columbia River, and at places is located upon the sides of precipitous hills and rocky cliffs. That the construction of said railroad line is of such a heavy nature, that a steam shovel and construction trains with dump cars are necessary in the building of said roadbed. That said steam shovel and construction trains are now working about two miles north of Lot Four (4), Section Thirteen (13), Township Twenty-eight (28) North of Range Twenty-three (23) E., W. M., portions of which constitute the farm of the complainant herein, George M. Taggart. That said steam shovel will reach the north boundary of said Lot Four (4) in about three weeks. That said railroad across the greater portion of the northerly one-half of said Lot Four (4) is to be constructed on a fill of varying heights, and that across the southerly one-half of said lot, said railroad will be constructed in a cut of varying depths, gradually increasing in depth from one foot, at a point near the center of said Lot Four (4), to twenty (20) feet in depth at the southerly boundary thereof. That before said steam shovel can be located at any point on said Lot Four (4), where cutting is necessary, a trestle must be constructed over the places which will later be filled, for the purpose of carrying

said construction train with material from points north of said Lot Four (4) to be dumped between the supports of said trestle, so that the same may be sufficiently strengthened to carry said steam shovel to the point on said Lot Four (4), where it will be located for the purpose of making said cut. That after the construction and strengthening of said trestle, as aforesaid, said steam shovel will be moved and located at the point on said Lot Four (4), where the cutting begins. That the material taken from said cut upon the southerly portion of said Lot Four (4) will then be taken in the cars of said construction train and dumped along said trestle, to widen said fill to the width necessary to support a standard gauge railroad.

That beyond the southerly boundary of said lot, there are about four miles of steam shovel work to be done, in a method similar to that above described, and that if said defendant is not permitted to construct its railroad across said Lot Four (4) it will either have to move said steam shovel around said Lot Four (4), to a point about four miles below the southerly boundary thereof, and commence working northerly from said point in the direction of said Lot Four (4), or said defendant will be obliged to tie up said steam shovel and construction train, and release all the men now in its construction gang.

That to move said steam shovel and construction train beyond said Lot Four (4), a track would have to be constructed, upon a reasonable grade, from a point near the northerly boundary of said Lot Four (4), down to the bank of the Columbia River. That after grading and

construction of said track, said steam shovel and construction train would have to be moved over the same down to the bank of the Columbia River, and there loaded upon a barge and towed upon said barge to a point about four miles below the southerly boundary of said Lot Four (4). That said outfit would then have to be unloaded from said barge and a track constructed from said point on the bank of the Columbia River, upon a reasonable and practicable grade, up to a point upon the located line of said railroad where it could commence the cutting and construction of said roadbed, northerly in the direction of said Lot Four (4). That all the territory upon which said tracks would have to be constructed, as aforesaid, is rocky and mountainous, and that the cost of moving said steam shovel, in the manner above outlined, would amount to approximately eight thousand dollars (\$8000.00).

That said cost is so great as to make the moving of said steam shovel and outfit impracticable, and the same would have to be tied up, if not allowed to go upon said Lot Four (4).

That the daily wages of the men engaged in operating said steam shovel and outfit, are about one hundred and seventy-five dollars (\$175.00), and that the daily cost of feeding said men amounts to about fifty dollars (\$50.00). That if said steam shovel and outfit were tied up, all of said crew would either have to be discharged, or retained at the expense above mentioned. That if said crew were discharged, it would take about two weeks to re-assemble sufficient men to operate said steam shovel and construction train. That the fair

rental value of a steam shovel and construction train of the character used by said defendant in said work of grading and building said roadbed, and the fair and reasonable value of the use of such steam shovel and construction train is approximately one hundred dollars (\$100) per day, and that if the said outfit were tied up, the daily loss to said defendant, on account of its inability to use said steam shovel and construction train, would be approximately one hundred dollars (\$100) per day.

That said defendant, Great Northern Railway Company, is proceeding with all possible haste to complete the grading and construction of said railroad line before the end of May, 1913, so that the tracks thereof may be laid and said railroad line in operation, for the purpose of moving the fruit and products of the residents of the surrounding country, in the fall of 1913, and that to that end said defendant is now engaged in grading said railroad line at many different points along the same, using ten steam shovels and a corresponding number of construction trains.

That the width of the strip which will be occupied by said defendant in the construction and operation of its said railroad line across said Lot Four (4), including all embankments and cuts, is shown upon the blue print map hereunto annexed. That said strip is not wider than one hundred (100) feet at any point upon the easterly side of the Great Northern Railway Company's center line, nor more than seventy-five (75) feet in width at any point upon the westerly side of said center line.

Further affiant saith not.

M. J. C. ANDREWS.



Lot 11

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rental value of a steam shovel and construction train of the character used by said defendant in said work of grading and building said roadbed, and the fair and reasonable value of the use of such steam shovel and construction train is approximately one hundred dollars (\$100) per day, and that if the said outfit were tied up, the daily loss to said defendant, on account of its inability to use said steam shovel and construction train, would be approximately one hundred dollars (\$100) per day.

That said defendant, Great Northern Railway Company, is proceeding with all possible haste to complete the grading and construction of said railroad line before the end of May, 1913, so that the tracks thereof may be laid and said railroad line in operation, for the purpose of moving the fruit and products of the residents of the surrounding country, in the fall of 1913, and that to that end said defendant is now engaged in grading said railroad line at many different points along the same, using ten steam shovels and a corresponding number of construction trains.

That the width of the strip which will be occupied by said defendant in the construction and operation of its said railroad line across said Lot Four (4), including all embankments and cuts, is shown upon the blue print map hereunto annexed. That said strip is not wider than one hundred (100) feet at any point upon the easterly side of the Great Northern Railway Company's center line, nor more than seventy-five (75) feet in width at any point upon the westerly side of said center line.

Further affiant saith not.

M. J. C. ANDREWS.

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M. J. C. ANDREWS.

Subscribed and sworn to before me this 17th day of December, 1912.

THOMAS BALMER,
Notary Public in and for the State of Wash-
ington, residing at Spokane.

Indorsed: Affidavits of M. J. C. Andrews and A. M. Anderson.

Filed in the U. S. District Court, Eastern District of Washington, Dec. 21, 1912.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

Due service of the within affidavits by a true copy thereof is hereby admitted at Seattle, Washington, this 18th day of December, A. D. 1912.

FRANCE & HELSELL,
Attorneys for Complainant.

*In the District Court of the United States for the
Eastern District of Washington, Northern
Division.*

No. 1542.

GEORGE H. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

OPINION.

FRANCE & HELSELL, for Complainant.

F. V. BROWN, CHARLES S. ALBERT and THOMAS
BALMER, for Defendant.

RUDKIN, District Judge. This is a controversy between a railway company and a settler over a right of way through certain lands which were heretofore public lands of the United States. The railway company claims its right of way under the Act of Congress of March 3, 1875 (18 Stat. L., p. 482, c. 152), sections one and four of which read as follows:

Sec. 1. "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side-tracks, turnouts and water stations, not to exceed in amount twenty acres for each station, to the extent of one station to each ten miles of road. * * *

Sec. 4. "That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey

thereof by the United States, file with the register of the land office in the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way; *provided*, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road."

The complainant, on the other hand, claims title under a patent from the United States, issued pursuant to the homestead laws. The case has been submitted to the Court on the application for a temporary restraining order and for a final decree upon the merits upon an agreed statement of facts. Omitting jurisdictional and other facts not deemed material the agreed case is this:

During the year 1906 The Washington & Great Northern Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, and authorized to locate and construct lines of railroad within the state, surveyed and located a line of railway from Wenatchee in a northerly direction along the west bank of the Columbia river to the mouth of the Okanogan River, and thence northerly to the international boundary line between the United States and the Dominion of Canada. The line of road as thus surveyed and located crossed Lot 4 of Section 13, Township 28, North of Range 23 E., W. M., in a northerly and southerly direction. The lot thus de-

scribed is the lot in controversy here, and was at that time unoccupied public land of the United States and so remained until the 17th day of September, 1907. The line of road as thus surveyed and located by The Washington and Great Northern Railway Company was adopted by resolution of its Board of Directors as the definite location of its line of railway, and the railway company, having filed with the Secretary of the Interior of the United States a copy of its articles of incorporation, and due proofs of its organization under the same, on the second day of January, 1907, filed in the United States Land Office at Waterville, Washington, maps showing the definite location of its line of railway as surveyed and located through the public lands of the United States, a copy of which maps is attached to the agreed statement. The maps thus filed were duly approved by the Secretary of the Interior on the 23rd day of March, 1908, and were returned to the local land office where the proper notations were made upon the plats, showing the located line across the public lands of the United States. In the month of July, 1907, The Washington & Great Northern Railway Company conveyed to the defendant, The Great Northern Railway Company, all its right, title and interest in and to the right of way thus located and acquired, and The Great Northern Railway Company has since been and is now the owner of the same. The Great Northern Railway Company filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, and during the years 1908 and 1909 revised the survey and location of the road as

theretofore made by its predecessor in interest, and on the 31st day of July, 1909, filed with the register and receiver of the United States Land Office at Waterville maps of such revision and of such amended definite location. A copy of this amended map is attached to the agreed statement and made a part thereof. The difference between the central line of the road as shown on the original maps and the central line of the road as shown on the amended map does not exceed twenty feet at any point where the lines cross Lot Four, but at other places the variation is as much as two hundred feet. On the twelfth day of January, 1912, the local land office at Waterville, Washington, by direction of the commissioner of the general land office, called the attention of The Great Northern Railway Company to the fact that its amended map of definite location was not accompanied by a relinquishment under seal of all rights under the original approval of the maps filed by The Washington & Great Northern Railway Company as to the portions thereof amended by the map filed by The Great Northern Railway Company, as required by section nineteen of the circular of the general land office, issued on May 21, 1909, which reads as follows:

“When the railroad is constructed, an affidavit of the engineer and certificate of the president must be filed in the local office, in duplicate, for transmission to the general land office. No new map will be required except in case of deviations from the right of way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree

with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the amended survey and amended definite location. In such case the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior."

Thereafter, on the sixth day of February, 1912, The Great Northern Railway Company released and relinquished to the United States all its right, title and interest in and to the right of way pertaining to the line of railway as shown upon the maps filed by its predecessor and approved by the Secretary of the Interior, "excepting and excluding, however, any and all of such right of way that is or may be situated within the limits of the right of way pertaining to the revised and relocated line of such company's railway shown upon the maps thereof filed in the United States District Land Office at Waterville, Washington, on the 31st day of July, 1909."

The relinquishment expressly provided that it should not take effect until the revised and amended map of definite location was approved by the Secretary of the Interior. The amended map thus filed was formally approved by the Secretary on the 13th day of July, 1912. Neither The Great Northern Railway Company nor its predecessor in interest filed a profile showing the elevations and grades of the proposed roads across the public lands of the United States and was never re-

quested so to do until the 17th day of November, 1910. On the latter date the register and receiver of the land office at Waterville, by direction of the Secretary of the Interior, notified the defendant that since the line of its railway as described in the map of amended definite location, crossed certain lands suitable for power sites, which had been temporarily withdrawn from entry and sale, the company would be required to file a profile showing the elevations and depressions at which the line of railway crossed such lands, and on the 4th day of May, 1911, pursuant to this request, the company did file a profile in the United States Land Office at Waterville, showing the elevations and depressions of its entire line from the crossing of the Okanogan River to the junction with the main line near Wenatchee. It is further stipulated that at all times since the fourth day of November, 1898, the regulations promulgated by the General Land Office of the United States, and approved by the Secretary of the Interior, under the Act of Congress of March 3, 1875, *supra*, contained the following:

“The word profile as used in this act is understood to intend a map of alignment. All such maps and plats of station houses are required by the act to be filed with the register of the land office for the district where the land is located. If located in more than one district, duplicate maps and field notes need be filed in but one district, and single sets in the others. The maps must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey of the line of route or of station grounds.”

Such is the claim of the railroad company.

The complainant on the other hand made entry of Lot Four, above described, together with other land, on the seventeenth day of September, 1907, under the homestead laws of the United States, and received patent therefor on the thirteenth day of February, 1912, after a full compliance with the homestead laws. The patent made no reservation of any railroad right of way.

The railroad company is now about to enter upon the strip of land one hundred and eighty feet in width, included in both the original and amended maps of definite location across Lot Four, and the complainant instituted this suit to restrain it from so doing. It will be seen from the foregoing statement that the railway company is at least first in point of time, but the complainant claims that his rights are superior to those of the company for two reasons. First. Because of the failure of the railroad company to file a *profile* of its road with the register of the land office as required by law; and, second, because any rights acquired under the original location were forfeited or abandoned by filing the map of amended location.

I am not convinced that either of these contentions is sound. Technically speaking, the term "profile" means, "a side or sectional elevation;" "a drawing showing a vertical section of the ground along a surveyed line or graded work," but it also means, "an outline or contour;" and the term, "outline" means, "the line which marks the outer limits of an object or figure; an exterior line or edge; contour."

Webster's International Dictionary, Titles, Profile and Outline.

It is very evident that Congress intended something more than a mere side or sectional elevation of the railroad, for such a map or profile would convey little or no information to either the government or prospective settlers. It would not show the location of the railroad upon the ground or describe the lands taken, and could in no event show the station houses. Furthermore, for a period of nearly forty years the Secretary of the Interior, who is charged with the administration of this law, has construed the term "profile" to mean a map of definite location, or a map of alignment.

Circular of January 13, 1888 (12 L. D., 423).

Circular of November 4, 1898 (27 L. D., 663).

This construction of the law by the officer charged with its administration has been acquiesced in by all departments of the government for so long a period that it should now be accepted by the courts.

United States v. Burlington R. Co., 98 U. S., 334.

Jewitt v. Shultz, 180 U. S., 139.

In the recent case of United States v. Minidoka & S. W. R. Co., cited by the complainant from the Circuit Court of Appeals for this circuit (190 Fed., 491), the Court, in the course of its opinion, said:

"The defendant railroad in this case filed with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization under the same, but has filed no profile map of its road with the register of the land office where the land is located, and no such profile map has been filed with or approved by the Secretary of the Interior."

I take it from this that no map of any kind was filed

in that case, and that the Court did not have before it the validity or sufficiency of the regulations promulgated by the Secretary of the Interior or of a map filed in compliance therewith. If it had, I doubt very much whether it would have declared invalid regulations and maps, the validity of which have been recognized and acquiesced in for so long a period, for later in its opinion the Court referred to the general authority conferred upon the Secretary of the Interior by the various acts of Congress relating to the public lands and said:

“All this is clearly included in the authority of the Secretary to approve or disapprove the profile of the road; * * *.”

And:

“We think the approval of the conditions upon which the railroad company may have a right of way through the lands of an irrigation project is imposed by the statute on the Secretary of the Interior as a judicial act to be evidenced by his approval or disapproval of the profile map.”

Again, in the recent case of *Stalker v. Oregon Short Line*, 225 U. S., 142, the Supreme Court uses indiscriminately such expressions as, “map of location;” “map showing the termini of such portion and its route over the public lands;” “map of alignment,” etc.

For these reasons I am of opinion that the profile or map filed with the Secretary of the Interior by the predecessor in interest of the present defendant was sufficient in law and vested title to the right of way in the defendant company. And if title vested in the defendant company upon the approval of the map by the Sec-

retary of the Interior, and if that approval related back to the time of filing the original map of alignment (Stalker v. Oregon Short Line, *supra*) the title thus acquired could only be divested in one of two ways; first, but a forfeiture declared by the government for breach of conditions; and, second, by the voluntary act of the company itself. No forfeiture has been declared by the government and the act of the company in making so slight a change in its located line should not be construed as a waiver or forfeiture of pre-existing rights contrary to the expressed intentions of both the government and its grantee. In demanding the relinquishment the Secretary of the Interior recognized the fact that title had already vested in the company, and he required only a relinquishment of the over-lap outside the exterior limits of the two located lines. In so doing, he, in my opinion, acted within his authority. The defendant is therefore claiming only what the Congress has granted to it and what the Congress has a right to grant, and if so, the complainant has no just ground for complaint. The temporary injunction must therefore be denied and the bill dismissed, and it is so ordered. Let judgment be entered accordingly.

Indorsed: Opinion.

Filed in the U. S. District Court, Eastern District of Washington, Dec. 31, 1912.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern
Division.*

GEORGE M. TAGGART, Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation, Defendant.

IN EQUITY.

DECREE.

The application of the complainant above named for a temporary injunction in the above entitled cause having come on regularly for hearing before the Hon. Frank H. Rudkin, Judge of the above entitled Court, on the 20th day of December, 1912, at this term, the complainant appearing by his solicitor, Frank P. Hellsell, and the defendant appearing by its solicitors, F. V. Brown, Charles S. Albert and Thomas Balmer; and said application of the complainant for a temporary injunction and the prayer of the complainant for a final decree herein, having by stipulation of the solicitors for the respective parties hereto, been submitted upon an agreed statement of facts, filed herein, and the affidavits of M. J. C. Andrews and A. M. Anderson, filed herein by the defendant, and said cause having been fully argued by counsel and fully considered by the Court, and said Court now being advised in the premises;

IT IS ORDERED, ADJUDGED AND DECREED, that said application of the complainant for a temporary injunction, be, and the same is hereby denied, and that the bill of complaint of the complainant herein, be, and the same is hereby dismissed, and that said de-

Great Northern Railway Company, Appellee. 61
fendant have and recover of the complainant its costs
and disbursements, taxed at

Done in open Court this 21st day of January, 1913.

FRANK H. RUDKIN,
Judge.

Indorsed: Decree.

Filed in the U. S. District Court, Eastern District of
Washington, Jan. 22, 1913.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

*In the United States District Court for the Eastern
District of Washington, Northern Division.*

No. 1542.

GEORGE M. TAGGART, Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation, Defendant.

PETITION FOR APPEAL TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR
THE NINTH CIRCUIT, AND ORDER ALLOW-
ING THE SAME.

To the Honorable District Court of the United States
for the Eastern District of Washington:

The above named complainant, George M. Taggart,
feeling himself aggrieved by the decree made and en-
tered by said Court on the 22nd day of January, 1913, in
the above entitled cause, does hereby appeal from said
decree to the United States Circuit Court of Appeals for
the Ninth Circuit, for the reasons specified in the

Assignment of Errors filed herein, and prays that this appeal may be allowed and that citation issue, as provided by law, to the respondent herein upon said appeal, and that a transcript of the record, proceedings and papers on which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

Dated this 16th day of July, A. D. 1913.

FRANCE & HELSELL,

Solicitors for Complainant.

The foregoing petition is granted, and said appeal is allowed upon complainant's giving a bond conditioned as required by law in the sum of two hundred and fifty dollars.

Dated this 17th day of July, A. D. 1913.

FRANK H. RUDKIN,

United States District Judge.

Indorsed: Petition for Appeal and Order allowing the same.

Filed in the U. S. District Court, Eastern District of Washington, July 18, 1913.

WM. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

Copy of within petition for appeal and order allowing same received and service of same acknowledged this 18th day of July, 1913.

CHARLES S. ALBERT,

Solicitor for Defendant.

Great Northern Railway Company, Appellee. 63
United States District Court, for the Eastern District of
Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

ASSIGNMENT OF ERRORS.

Now on the 16th day of July, 1913, came the complainant by his solicitors, Messrs. France & Helsell, and says that the decree entered in the above cause on the 22nd day of January, 1913, is erroneous and unjust to the complainant.

First: Because it decrees that the bill of complaint be dismissed.

Second: Because the decree operates to give the defendant a right of way over and across the lands of complainant, described in the bill of complaint, without compensating complainant in any manner for said right of way.

Third: Because said decree gives to the defendant a right of way over and across the lands of complainant, described in the bill of complaint, which is prior and superior to any right of the complainant in and to the land affected by the right of way.

Fourth: Because defendant has never complied with the Act of Congress of March 3, 1875, under which defendant claims to own a right of way over and across the lands of complainant.

Fifth: Because defendant did not comply with the requirements of the Act of March 3, 1875, prior to the acquisition by the complainant of his right and title in and to the land described in said bill of complaint.

Sixth: Because the rights of defendant, if any, by reason of the filing of its amended map of definite location and its relinquishment, were subordinate to the rights of complainant in the land in question.

Seventh: Because the defendant did not complete its railroad crossing complainant's land within the time required by law.

Eighth: Because the rights of complainant to the land in question were at all times prior and superior to the rights of the defendant, if any, in the land described in the bill of complaint.

Ninth: Because complainant will be irreparably injured by the dismissal of his bill of complaint.

Tenth: Because the complainant will be irreparably injured if a permanent injunction is not issued in this cause perpetually enjoining the said defendant from constructing and maintaining its railroad across the lands of complainant described in the bill of complaint.

WHEREFORE, the complainant prays that said decree be reversed and the District Court directed to grant him the relief prayed for in the bill of complaint herein.

FRANCE & HELSELL,

Solicitors for Complainant.

Indorsed: Assignment of Errors.

Filed in U. S. District Court, Eastern District of Washington, July 18, 1913.

WM. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

Copy of within assignment of errors received and service of same acknowledged this 18th day of July, 1913.

CHARLES S. ALBERT,
Solicitor for Defendant.

*In the United States District Court for the Eastern
District of Washington, Northern Division.*

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, George M. Taggart, as principal, and American Surety Company of New York, a body corporate, duly incorporated under the laws of the State of New York and authorized to transact business in the State of Washington, as surety, executing this bond in behalf of said principal, are jointly and severally held and firmly bound unto Great Northern Railway Company, a corporation, the defendant above named, its successors, and assigns, in the just and full sum of Two Hundred Fifty and no-100ths Dollars, for the payment of which sum, well and truly to be made, we bind ourselves, our, and each of our, successors, heirs, executors, administrators and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of July,
A. D. 1913.

The condition of this obligation is such that

WHEREAS, on the 22nd day of January, A. D. 1913, in the above entitled Court and action a decree was entered dismissing the said action and awarding costs, and the said George M. Taggart having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the said decree, and a citation directed to the said Great Northern Railway Company is about to be issued citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California;

NOW THEREFORE, if the said George M. Taggart shall prosecute said appeal to effect and answer all costs that may be awarded against him, if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and effect.

GEORGE M. TAGGART,

By FRANCE & HELSELL, (SEAL)

His Attorneys.

AMERICAN SURETY COMPANY
OF NEW YORK,

By FRANK C. PAINE,

Resident Vice President.

By W. G. GRAVES,

Resident Assistant Secretary.

The foregoing bond is hereby approved by me this
17th day of July, A. D. 1913.

FRANK H. RUDKIN,

United States District Judge.

Endorsed: Bond on Appeal.

Filed in the U. S. District Court, Eastern District of Washington, July 18, 1913.

WM. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

Copy of within bond received and service of same acknowledged this 18th day of July, 1913.

CHARLES S. ALBERT,

Solicitor for Great Northern Railway Co.

*In the United States District Court for the Eastern
District of Washington, Northern Division.*

No. 1542.

GEORGE M. TAGGART, Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation, Defendant.

CITATION ON APPEAL.

United States of America—ss.

The President of the United States to Great Northern Railway Company, a corporation:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein George M. Taggart is appellant and you, Great Northern Railway Company, a corporation, are appellee, to show cause, if any there be, why the decree

in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States of America, this 17th day of July, A. D. 1913, and of the Independence of the United States the 138th year.

FRANK H. RUDKIN,

(SEAL) United States District Judge for the
Eastern District of Washington,
Northern Division.

Service of the foregoing citation upon said appellee this 18th day of July, 1913, is hereby acknowledged.

CHARLES S. ALBERT,

Solicitor for Great Northern Railway Co.

Received copy of the foregoing citation lodged with me for appellee this 18th day of July, 1913.

W. H. HARE,

Clerk of said Court.

By FRANK C. NASH,

Deputy Clerk.

Indorsed: Citation on Appeal.

Filed in the U. S. District Court, Eastern District of Washington, July 18, 1913.

WM. H. HARE, Clerk,

By FRANK C. NASH, Deputy.

Copy of within citation received and service of the same acknowledged this 18th day of July, 1913.

CHARLES S. ALBERT,

Solicitor for Defendant, Great Northern
Railway Co.

Great Northern Railway Company, Appellee. 69
In the United States District Court for the Eastern
District of Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

CITATION ON APPEAL.

Lodged Copy.

United States of America—ss.

The President of the United States to Great Northern
Railway Company, a corporation:

You are hereby cited and admonished to be and appear
at the United States Circuit Court of Appeals for the
Ninth Circuit to be held at the City of San Francisco, in
the State of California, within thirty (30) days from the
date of this writ, pursuant to an appeal filed in the
Clerk's office of the District Court of the United States
for the Eastern District of Washington, Northern Di-
vision, wherein George M. Taggart is appellant and you,
Great Northern Railway Company, a corporation, are
appellee, to show cause, if any there be, why the decree
in the said appeal mentioned should not be corrected and
speedy justice should not be done to the parties in that
behalf.

WITNESS, the Honorable Edward Douglas White,
Chief Justice of the Supreme Court of the United

States of America, this 17th day of July, A. D. 1913, and of the Independence of the United States the 138th year.

FRANK H. RUDKIN,
(SEAL) United States District Judge for the
Eastern District of Washington,
Northern Division.

Service of the foregoing citation upon said appellee this 18th day of July, 1913, is hereby acknowledged.

CHARLES S. ALBERT,

Solicitor for Great Northern Railway Company.

Received copy of the foregoing citation lodged with me for appellee this 18th day of July, 1913.

W. H. HARE,

Clerk of said Court.

By FRANK C. NASH,

Deputy Clerk.

Indorsed: Citation on Appeal, Lodged Copy.

Filed in the U. S. District Court, Eastern District of Washington, July 18, 1913.

WM. H. HARE, Clerk.

By FRANK C. NASH, Deputy.

Copy of within citation, lodged copy, received and service of same acknowledged this 18th day of July, 1913.

CHARLES S. ALBERT,
Solicitor for Defendant, Great Northern
Railway Co.

Great Northern Railway Company, Appellee. 71
In the United States District Court for the Eastern
District of Washington, Northern Division.

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY. a
corporation,

Defendant.

STIPULATION WITH RESPECT TO THE
RECORD.

IT IS HEREBY STIPULATED BY AND BETWEEN THE PARTIES HERETO that the Clerk of this Court, in making up his return to the citation on appeal herein, shall include therein the following:

Subpoena with Marshal's return thereon.

Bill in Equity.

Application for Preliminary Injunction.

Notice of Application.

Answer and Exhibit A attached thereto.

Stipulation waiving verification.

Stipulation that Exhibits referred to in agreed statement of facts.

Exhibits A, B, C, and D.

Stipulation that Exhibits referred to in agreed statement of facts need not be attached to said stipulation.

Affidavit of A. M. Anderson.

Affidavit of M. J. C. Andrews and map attached.

Opinion of Court.

Decree dismissing action.

Assignment of errors.

Petition for appeal and order allowing the same.

Bond on appeal.

Original citation, with acceptance of service thereof.

Copy of citation lodged with clerk for appellee.

Stipulation with respect to the record.

Order with respect to the record.

which comprise all the papers, records and other proceedings which are necessary to the hearing of the appeal in said action in the United States Circuit Court of Appeals, and that no other papers, records or other proceedings than those above mentioned need be included by the clerk of said court in making up his return to said citation as a part of such record.

IT IS FURTHER STIPULATED AND AGREED that the application for preliminary injunction, notice of hearing, stipulation waiving verification, Exhibit A attached to the answer and exhibits referred to in the stipulation for submission of cause on agreed statement of facts, numbered "A" "B" "D", and that map attached to the affidavit of M. J. C. Andrews, need not be printed in the record, but the same may be sent as originals to the Circuit Court of Appeals for the Ninth Circuit in lieu of printing the same, and that an order of the above entitled Court may be entered to that effect.

FRANCE & HELSELL,

Solicitors for Complainant.

CHARLES S. ALBERT,

THOMAS BALMER,

F. V. BROWN,

Solicitors for Defendant.

Indorsed: Stipulation with respect to the Record.

Filed in the U. S. District Court, Eastern District of Washington, July 30, 1913.

WM. H. HARE, Clerk,
By FRANK C. NASH, Deputy.

*In the District Court of the United States for the
Eastern District of Washington, Northern
Division.*

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

ORDER WITH RESPECT TO RECORD.

It appearing to the Court that upon the hearing of this cause on its merits, there was filed in said cause certain blue print maps which were marked Exhibits "A", "B", "D", which were referred to in the stipulation of agreed facts, and certain maps attached to the affidavit of M. J. C. Andrews, and the answer of defendant, which maps cannot with convenience be printed as a part of the record on appeal, and it appearing that the parties hereto have stipulated that said maps may be sent to the Circuit Court of Appeals for the Ninth Circuit,

NOW THEREFORE, the Clerk of this Court is hereby directed to omit said maps from the printed record on appeal in his return to the citation on appeal,

and said Clerk is directed to forward the originals of said maps to the Circuit Court of Appeals, in lieu of printing the same in the record on appeal, at the time the said Clerk forwards said record to the Circuit Court of Appeals.

Dated this 31st day of July, 1913.

FRANK H. RUDKIN,

United States District Judge.

Filed July 31, 1913.

W. H. HARE, Clerk.

By F. C. NASH, Deputy.

*In the United States District Court for the Eastern
District of Washington, Northern Division.*

No. 1542.

GEORGE M. TAGGART,

Complainant,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
corporation,

Defendant.

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD.

United States of America,
Eastern District of Washington,—ss.

I, W. H. HARE, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing printed pages, numbered from 1 to 75, inclusive, to be a full, true, correct and complete copy of so much of the record,

papers, exhibits, depositions and other proceedings, in the above and foregoing entitled cause, as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, and as is stipulated for by counsel of record herein, as the same remain of record, and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the order, judgment and decree of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

I further certify that I hereto attach and hereto transmit the original citation issued in this cause.

I further certify that the cost of preparing, certifying and printing the foregoing transcript is the sum of Seventy-six Dollars and Twenty Cents, and that the said sum has been paid to me by Messrs. France & Helsell, solicitors for complainant and appellant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 6th day of August, 1913.

(Seal)

W. H. HARE, Clerk.

By Francis C. Nash, Deputy

No. 2304

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GEORGE M. TAGGART,
Appellant,

vs.

G R E A T N O R T H E R N R A I L -
W A Y C O M P A N Y, a corpora-
tion,
Appellee.

Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

The appellant, George M. Taggart, is a farmer living upon the Columbia River north of Wenatchee. On September 7, 1907, appellant made homestead

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entry upon the land in controversy in this action. He has lived upon said land since that time, has improved the same by the erection of buildings, the planting of fruit trees, and the installation of an irrigating system. On February 3, 1912, the United States Government issued to the appellant a patent for said land in which no reservation or mention of a right-of-way was made.

At the time this action was instituted appellee was building a railroad north from Wenatchee along the Columbia River. It threatened to go upon the appellant's land, to make a deep cut across the same, and destroy appellant's fruit trees and his irrigating system, and the railway company made no offer to pay for a right-of-way across appellant's land, but claimed to own such right. This action was begun by appellant to restrain the threatened trespass upon appellant's land by the railway company. After the institution of the action the parties stipulated the facts material to a determination of the action and the same appear in the transcript of record on page 28. The Great Northern Railway Company claims to own a right-of-way across the appellant's land because of an alleged compliance with the Act of March 3, 1875, 18 Stat. p. 482. It is provided in Section 1 of said Act:

“That the right-of-way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state * * * to the extent of one

hundred feet on each side of the central line of said road; * * *”

Sections 2 and 3 of said act need not be set forth in detail.

Section 4 is as follows:

“That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and, upon approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.”

It is admitted in the stipulation of agreed facts that on January 2, 1907, the Washington & Great Northern Railway Company, predecessor in interest of the appellee, filed in the Land Office at Waterville, Washington, a map which is marked Exhibit

“A” and has been attached to the original transcript on file in this Court. It is admitted that on March 23, 1908, this map, marked Exhibit “A,” was approved by the Secretary of the Interior. It is further admitted by both parties that the Great Northern Railway Company succeeded to all of the rights of the Washington & Great Northern Railway Company under the map, Exhibit “A.” On July 31, 1909, the appellee having revised the survey of its line along the Columbia River did file with the United States Land Office at Waterville, Washington, a new map showing a new and different route of its Columbia River branch. The line of route of said Columbia River branch as shown by the second map filed by the appellee differed from the old line shown by the first map in varying degrees. In some instances the new line differed many hundreds of feet from the old line.

After the second map had been filed the Great Northern Railway Company, at the suggestion of the Secretary of the Interior, on May 4, 1911, filed *a profile* of its road. (Transcript, page 35.) This later map showed the elevations and depressions of its entire line. At this point it is important to call the Court’s attention to the fact that the two maps filed in 1907 and 1909, respectively, were not profiles of the road but were merely maps of alignment. The first profile of the road was filed on May 4, 1911.

At the time the second map of alignment was filed in the Land Office at Waterville, Washington, on

July 31, 1909, there existed a regulation of the General Land Office (see transcript, p. 33), which provided as follows:

“When the railroad is constructed, an affidavit of the engineer and certificate of the president must be filed in the local office, in duplicate, for transmission to the General Land Office. No new map will be required except in case of deviations from the right-of-way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the amended survey and amended definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior.”

This regulation was apparently in force for the purpose of not permitting a railway company to claim a right-of-way under more than one map. The railway company, when it amended portions of its line by filing new maps, was compelled to relinquish its rights in and to the right-of-way shown

by its original maps as to the portions amended. In February, 1912, the appellee filed a release and relinquishment of its right, title and interest in the right-of-way delineated by its first map of alignment filed in January, 1907. This relinquishment is shown as Exhibit "C" on page 38 of the transcript. The amended map of alignment filed at Waterville, July 31, 1909, was approved by the Secretary of the Interior on July 13, 1912.

By reason of the foregoing facts the appellee claims to own a right-of-way across the appellant's land which is prior and superior to any right in the land owned by the appellant. Appellant on the contrary maintains that the appellee by filing the maps heretofore mentioned has acquired no right in appellant's land which is superior to the ownership of the appellant therein, and that the appellee must condemn and pay for a right-of-way over the said land before it can construct its line thereon.

As appears from the opinion of the trial Court (see transcript, p. 51), the cause was, upon the hearing for a temporary injunction, submitted to the trial Court for a final decree upon the merits upon the agreed statement of facts. The Court entered a decree dismissing the bill of complaint, which was filed on January 22, 1913. The complainant in the Court below has prosecuted this appeal from said decree of dismissal.

SPECIFICATION OF ERRORS.

The trial Court committed the following errors:

1. The Court erred in holding that the map of alignment, Exhibit "A," was a profile under the meaning of the Act of March 3, 1875, and the filing of such map in the Land Office at Waterville was a compliance with the said act giving to the appellee a right-of-way across the land in controversy superior to the right of appellant in said land.

2. The Court erred in holding that the right of appellee to build its railroad according to the amended map of alignment became vested in the appellee as of January 2, 1907, the date of filing at Waterville, Washington, the first map of alignment.

3. The Court erred in declining to hold that before the appellee could acquire a right-of-way across appellant's land it must file in the Land Office at Waterville a profile of said line of railroad, showing the elevations and depressions of the right-of-way.

4. The Court erred in refusing to hold that the relinquishment filed by the appellee, marked Exhibit "C," was not a relinquishment of any right of the appellee in the land in controversy under the map of alignment filed January 2, 1907.

5. The Court erred in refusing to hold that the filing of the amended map of alignment on July 31, 1909, was in effect an abandonment and relinquish-

ment of any rights of appellee under the original map of alignment.

6. The Court erred in holding that the appellee acquired rights in the land in controversy prior to those acquired by the appellant.

7. The Court erred in dismissing the bill of complaint in this action upon the ground that the appellee acquired a right-of-way in the land in controversy before the appellant acquired any interest in said land.

BRIEF OF ARGUMENT.

1. In acquiring a right-of-way under the Act of March 3, 1875, a railway company acquires no rights as opposed to possessory claimants upon the public lands until a profile of its road is filed in the local Land Office and approved by the Secretary of the Interior.

Spokane Falls etc. Ry. Co. v. Ziegler, 167 U. S. 65.

Minneapolis etc. Ry. Co. v. Doughty, 208 U. S. 251.

Actual construction of the road upon the ground is a substitute for filing the profile.

Jamestown etc. Ry. Co. v. Jones, 177 U. S. 125.

The approval of the Secretary of the Interior relates back to the date of filing the profile in the local Land Office and eliminates the rights of possessory

claimants which have been initiated after the filing in the local Land Office and before the approval of the Secretary.

Stalker v. Oregon Short Line etc. Ry. Co., 225
U. S. 142.

Appellant will contend that the word "profile" in the Act of March 3, 1875, means what it says, namely, a map showing the depressions and elevations in the line of the railroad or a drawing showing a vertical section of ground along a surveyed line or graded work. Appellant contends that the filing of a map of alignment is not a compliance with the terms of the statute and that since no profile of the road was filed by the appellee prior to May, 1911, that the appellant's right which were acquired in September, 1907, are prior to those of appellee and must be condemned and paid for.

When a word has a certain and distinct meaning, such as the word "profile," there is no room for construction. The courts have no power under the guise of construction to change one word into an entirely different one.

Hamilton v. Rathbone, 175 U. S. 414, 421.
U. S. v. Goldenberg, 168 U. S. 95, 102.

The construction by the Department of the Interior can in this instance have no force. No executive department of government can by construction change one word into another. The courts have never permitted the contemporaneous construction of a law by the executive department to overrule the

express and certain terms of the law itself. It is only in cases where ambiguity exists that the courts will notice the construction put upon a law by the executive department.

Houghton v. Payne, 194 U. S. 88, 99.

St. Paul etc. Ry. Co. v. Phelps, 137 U. S. 528.

Fairbanks v. United States, 181 U. S. 311.

United States v. Grand Rapids, etc. Ry. Co.
154 Fed. 131, 136.

United States v. Tanner, 147 U. S. 661.

Morrill v. Jones, 106 U. S. 467.

The grant of a right-of-way to the railway company under the Act of March 3, 1875, is a sheer gift from the government and the doctrine of strict construction should apply to such grants. Every intendment will be resolved against the grantee.

Lewis' Sutherland Statutory Construction,
2nd edition, Sec. 548.

A corollary of this rule is that the court will not hold that the railway company has acquired a right-of-way under the Act unless a strict compliance with the terms of the law is shown.

It has been the custom of some railroads to file both a profile of the road and a map of alignment at the same time.

Rio Grande v. Stringham (Utah), 110 Pac.
868.

Chicago etc. Ry. Co. v. Van Cleave (Kan.),
33 Pac. 472.

In support of the appellant's contention that the Act of March 3, 1875, requires a *profile* in fact to be filed in the local Land Office, we cite a decision of this Court which is conclusive on the point. The meaning of the word "profile" has been carefully considered by this Court and appellant's position in this brief has been adopted in the case of *United States v. Minidoka S. W. R. Co.*, 190 Fed. 491. This case is squarely decisive of this action and forecloses further discussion.

Conceding for the sake of the argument that the filing of a map of alignment is a sufficient compliance with the Act of March 3, 1875, appellant contends that by relinquishing all rights in the map of alignment of 1907 and by the preparation and filing of a new map in 1909, showing a new and different route the appellee must be held to have lost all rights by virtue of the map relinquished. When it appears that the railroad company filed a new map in 1909, showing a different line to be followed by the railroad, and that the railroad is actually constructing its railroad according to the second map, then all of the appellee's rights to a right-of-way adjoining the new line depend upon the map which shows that new line; that the date of acquiring a right to build is of course the date of filing the map which describes the line under actual construction.

The railroad company is now building its line by virtue of the approval by the Secretary of the Interior of the second map filed. The approval by the

Secretary of the second map can only relate back to the date of filing that map.

Stalker v. Oregon Short Line etc. Ry. Co.
225 U. S. 142.

Since the right of construction dates only from 1909 then the interest of the railroad in the right-of-way can only date from the same time.

The right of any railroad in a right of way under the public land grants can only date from the time of fixing the final route which is to be followed.

Missouri etc. Ry. Co. v. Cook, 163 U. S. 491.
Washington & I. Ry. Co. v. Couer D'Alene R. Co. 160 U. S. 77.

Union Pacific v. Harris, 215 U. S. 386.

Montana Ry. Co. 21 L. D. 250.

The issuance to appellant of a patent without reserving any right of way is an adjudication by the executive department that the right of the railroad dates from the filing of the new map.

Smith v. Northern Pacific, 58 Fed. 513.

ARGUMENT.

Before coming to the exact points involved in this case it will be well for us to consider a few of the more important cases in which has been construed the Act of March 3, 1875, granting to railroad companies a right of way across the public domain. It was first contended by the railroads under that act that their rights accrued to the right of way as of the

date of survey. This question was finally settled in the case of *Minneapolis etc. Ry. Co. v. Doughty*, 208 U. S. 251. In that case the Court held that no rights were acquired by the railway until the filing of a profile of its road with the register of the local Land Office and the subsequent approval by the Secretary of the Interior. Prior to that decision it had been held in *Jamestown etc. Ry. Co. v. Jones*, 177 U. S. 125, that actual construction of the road could be used in lieu of filing a profile.

See *Spokane Falls etc. Ry. Co. v. Ziegler*, 167 U. S. 65.

The last important case construing this act is *Stalker v. Oregon Short Line etc. Co.*, 225 U. S. 142. In that case it is held that the approval by the Secretary of the Interior of a map of station grounds relates back to the date of filing said map in the local Land Office and that the railway company takes precedence over a settler whose rights have been initiated after the filing in the local Land Office and before the approval of the Secretary.

All the foregoing cases when taken together emphasize the fact that no rights can be acquired by a railway company under the Act of March 3, 1875, until a profile of the road is filed in the local Land Office; that there must be some definite unequivocal act which fixes the way acquired by the railroad under the statute. Under said decisions the railroad may fix and determine the limits of the land which it acquires either by constructing the road

upon the ground or by preparing a profile of its road and filing it in the local Land Office. This act of filing the profile fixes once and for all its route. The railroad must, if it desires to claim by virtue of the profile filed, build according to the route designated upon its profile.

Since the railroad can acquire no right of way until it files a profile of its road as required by the Act of March 3, 1875, it becomes of first importance to learn when the appellee in this case filed its profile as required by law. If appellant's rights to the land were initiated prior to the filing in the local Land Office of the profile required by law, then appellant's rights are prior to those of the railway and the right-of-way must be condemned and paid for.

It is conceded by the stipulation of facts that no profile of its road was filed by the appellee until May 4, 1911. (See paragraph XIII of the stipulation, p. 35 of transcript.) Appellee, however, contends that it did file Exhibit "A" which is a map of alignment on January 2, 1907, and Exhibit "B" which is another map of alignment, on the 31st day of July, 1909. We ask the Court to carefully examine these two maps with a view of determining their general character and nature. These maps are not profiles in any sense of the term. They cannot be held to come within the express provision of the statute. They are maps of alignment alone. They do not show the elevations and depressions of the railroad line and do not pretend to do so. The word "profile" used in the Act of March 3, 1875,

has a certain and distinct meaning. There is no ambiguity about it. A profile of a railroad is a map showing the elevations and depressions of said road. From said map it can be determined the exact elevation at which said road crosses a particular piece of land.

“A profile is the outline of a vertical section through a country or line of work, showing actual or projected elevations and hollows.”—Standard Dictionary.

It also means, “a drawing showing a vertical section of ground along a surveyed line or graded work, as of a railway, showing elevations, depressions, grades, etc.”—Webster’s International Dictionary.

The word “profile” is one of a very few words which have but one single, clear, distinct meaning. Any civil engineer will answer readily that a profile must of necessity show depressions and elevations; it must also show the grades. There can be no ambiguity in the use of such a word. There is not the slightest opportunity for construction or interpretation, and yet the appellee has insisted and does insist that the filing of a map of alignment such as Exhibits “A” and “B” is a compliance with the law and that by the filing of such maps a right-of-way was acquired. Unless courts are prepared to absolutely ignore the express terms of a statute, this contention cannot be sustained.

We desire at this point to meet certain contentions which have been made and will be made by the appellee in regard to this word “profile.” In the

first place the appellee contends that the law did not intend the word "profile," but meant a map of alignment. This is, of course, a contradiction in terms, because the courts can only determine what the legislative body meant by the words used. The word "profile" cannot mean and has never meant a map of alignment. We know of no rule whereby the courts can say that when Congress used the word "profile" it meant something else entirely different. It is the business of courts to interpret the law as it is found. If there is no ambiguity then there is no room for construction.

In *Hamilton v. Rathbone*, 175 U. S. 421, the Court spoke as follows:

"Indeed, the cases are so numerous in this Court to the effect that the province of construction lies wholly within the domain of ambiguity that an extended review of them is quite unnecessary."

In *United States v. Goldenberg*, 168 U. S. 95, 102, the Court said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are

few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute."

Appellee relies very strongly upon the fact that the regulations of the Department of the Interior provide in regard to this act that the word "profile" is understood to intend a map of alignment. We earnestly submit that the officials of the General Land Office cannot by construction change one word into another. The word "profile" has a distinct and certain meaning and there is neither power in the Land Office nor in the courts by construction to waive a strict provision of law and substitute one requirement for another. It has been conceded by all courts, including the courts rendering the decisions above cited, that in order to acquire a right-of-way under the Act of March 3, 1875, railway companies must strictly comply with the requirements of that act. It may have been within the power of the Secretary of the Interior to require the railroad to file a map of alignment in addition to the profile mentioned in the statute, but there could be no authority in that official to waive a provision of the law.

It is insisted that the construction placed upon the law by the Land Office should control. It has, however, never been admitted that the Land Office

could by construction waive the express requirements of the law. And courts, under the doctrine of contemporaneous construction by the executive department, have never yielded to the executive department the inherent powers of the judicial department of the Government. It is a well established principle that the doctrine of contemporaneous construction by the executive department can carry no weight with the courts unless an ambiguity exists. It cannot reasonably be maintained that there exists any ambiguity in the word "profile." There is another rule of construction which is of universal acceptance. That rule is that the courts will accept the meaning of words in their ordinary usage; that the lawmaker is presumed to know the meaning of words and to use them for a purpose. That courts will not accept executive construction of law except where a positive ambiguity exists, we cite the following authorities:

Houghton v. Payne, 194 U. S. 88, 99, in which the Court said:

"But in addition to these considerations it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. *United States v. Graham*, 110 U. S. 219; *United States v. Finnell*, 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as

to the original correctness of such construction. A custom of the department, however, long continued by successive officers, must yield to the positive language of the statute."

The same principle is sustained in *St. Paul etc. Ry. Co. v. Phelps*, 137 U. S. 528.

In *Fairbank v. United States*, 181 U. S. 311, the Court, after reviewing many authorities upon this subject, said:

"From this resume of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful."

In *United States v. Grand Rapids etc. Ry. Co.*, 154 Fed. 131, 136, the Court said:

"The construction put upon the grant by the land department, as not excepting lands reserved for Indian purposes, cannot legally pre-

vail against a clearly correct legal interpretation."

See

United States v. Tanner, 147 U. S. 661.

Morrill v. Jones, 106 U. S. 467.

We call the Court's attention to the doctrine of strict construction which should control in cases of the grant of privileges and gifts from the Government. In this case the appellant is a man who has acquired the full legal title to the land to be crossed by the railroad. He has acquired it by his residence upon the land, by his cultivation of the soil, by the improvements he has placed upon his farm, and by his payments to the United States Government. The appellee on the other hand claims a right-of-way across this land by a gift from the United States Government. Even had the appellee filed a profile as required by law, the peculiar construction of the five-year limit mentioned in Section 4 of the Act of March, 3, 1875, permits the railroad to wait in the construction of its line as long as it desires to do so. Under the decision no one can complain but the United States Government. It follows, therefore, that it should be and has been the policy of the courts to require a strict compliance by the railway company with all the provisions of the law before it will be said that it has acquired such a right across the public lands. In other words, the doctrine of strict construction has been applied to such grants. That doctrine is

that every intendment will be resolved against the grantee.

In *Lewis' Sutherland Statutory Construction*, 2nd ed. Sec. 548, the following well known rule is enunciated:

“They are construed strictly in favor of the government on grounds of public policy. If the meaning of the words be doubtful in a grant designed to be of general benefit to the public, they will be taken most strongly against the grantee and for the government, and therefore should not be extended by implication in favor of the former beyond the natural and obvious meaning of the words employed.”

It should be the rule then that where the rights of an intervening possessory claimant are in question, the courts will require a showing that the strict letter of the law granting the right-of-way has been followed. In no such instance should the officials of the Land Office or the courts, in lieu of a strict construction, waive or ignore the words of the act itself.

That there is a clear distinction between a map of alignment and a profile is conceded in the stipulation by the parties themselves. The maps filed by appellee in 1907 and 1909 are referred to as maps of location or alignment. It is conceded, on page 35 of the transcript, that appellee did file a *profile* in the United States Land Office at Waterville, Washington, on May 4, 1911. The fact that the

appellee did file a profile should estop it from contending that the other maps were in any sense profiles. A superficial examination of the two maps marked Exhibits "A" and "B" will show that they bear no resemblance to a profile. We desire again to remind the court that by the express provisions of the Act of March 3, 1875, no rights pass to the railroad until a *profile* of the road has been filed in the local Land Office and that profile has been approved. Therefore, no rights of any sort were acquired by the appellee until the profile was filed in May, 1911. That a profile is a useful and practicable map to be filed by the railroad is shown by the fact that one was actually filed. Furthermore, one of the entire line was actually filed. Why, indeed, should this profile of the entire road be filed were it not the instrument required by the Act of March 3, 1875? If a profile of the road had been filed in the local Land Office prior to the initiation of the appellant's homestead entry, information could have been obtained which would indicate the exact elevation at which the railroad would cross appellant's land; his irrigating system could have been adjusted to the elevations prescribed in the profile; other valuable information as to the cuts and fills across said lands would have been available. It is perfectly clear that a profile in fact was what Congress intended when it used the word.

It has been the custom of some railroads to file both a profile of the road and a map of alignment

at the same time. In many cases the court recites that a profile and map were filed.

See

Rio Grande v. Stringham (Utah), 110 Pac. 868.

Chicago etc. Ry. Co. v. Van Cleave (Kan.), 33 Pac. 472.

It is true that in many cases the word "profile" and the term "map of alignment" have been used interchangeably, but this has been because the point was not under consideration in those cases. The only decision of any Court construing the Act of March 3, 1875, in which this point has been decided is the case of *United States v. Minidoka etc. S. W. R. Co.*, 190 Fed. 491. That case was decided by this Court, and was an action brought by the United States to restrain the defendant railroad company from constructing a railroad across certain lands of the United States. The evidence showed that the land which the railroad sought to cross was thrown open for the purpose of the reclamation act only. The court held, however, that the lands were public lands of the United States under the Act of March 3, 1875, and that a right-of-way could be obtained over them. At the outset the Court adopts the fundamental rule of construction for such grants, namely, that since they are grants or gifts from the Government they must be strictly construed against the railroad. A corollary of the same rule of construction would be that nothing

passes until the railroad company complies strictly with all of the requirements of the act. This Court, in discussing the very point in question, namely, the meaning of the word "profile," uses the following language:

"It is to be observed that the map required to be filed with the register of the Land Office and approved by the Secretary of the Interior by the Act of March 3, 1875, is a profile of the road. This is something more than an alignment map or a map of definite location. A 'profile' is 'the outline of a vertical section through a country or line of work, showing actual or projected elevations and hollows.'—Standard Dictionary. 'A drawing exhibiting a vertical section of the ground along a surveyed line, or graded work, as of a railway, showing elevations, depressions, grades, etc.'—Webster's In. Dictionary. 'A vertical section through a work or a section of country, to show the elevations or depressions.'—Century Dictionary.

With a map of this character before the Secretary of the Interior showing the contour of the projected line of railroad through the public lands included in an irrigation and reclamation project, he can determine whether the construction of such a road would interfere with the project. He can determine, also, whether suitable provision has been made for the crossing of canals and other waterways, and, if not, what provision is required to preserve the

work of the reclamation service from encroachment and impairment. All this is clearly included in the authority of the Secretary to approve or disapprove the profile of the road.”

This is a formal binding adjudication by this Court upon the point here relied upon. The matter has been carefully and seriously considered in a separate paragraph of that decision.

We earnestly submit that this case last referred to is squarely decisive of this action and forecloses all discussion of the point in controversy.

The Filing of the Second Map of Alignment.

Conceding now for the sake of the argument that the filing of a map of alignment was all that the Act of March 3, 1875, required, it is appellant's contention that by reason of the filing of the second map of alignment in 1909, the Great Northern Railway Company has abandoned and lost all rights which it ever had by reason of the filing of the original map of alignment in 1907. The Court will recall that the stipulation of agreed facts shows that on July 31, 1909, a second map called an amended map of definite location was filed by the Great Northern Railway Company. (See transcript, p. 32, par IX.) This map appears in the record as Exhibit “B.” By reference to the two maps of alignment, Exhibits “A” and “B,” it appears that as to the land owned by appellant the two lines of railroad are separate and distinct. As to appellant's land the two lines are about twenty feet apart. The Court will fur-

ther observe that in certain sections of the map, Exhibit "B," the amended line of railroad is many hundred feet from the old line shown in the original map. It is apparent then that the railway company discovered that it had not fixed upon the proper route for the railroad and desired to change the same. It will also be noticed that the appellee, in order to acquire any rights by reason of the amended map, took all of the steps required by the Act of March 3, 1875, in the same manner that its predecessor in interest had done in filing the original map. The officials of the Land Office withheld their approval of the second map for some period of time, and it will be conceded by all parties that until the approval by the Secretary of the second map was obtained no rights were acquired by the railroad. In other words, the railroad company initiated its rights over again.

As appears from all of the cases heretofore cited construing the Act of March 3, 1875, it has been definitely settled that no rights can be acquired by the railroad to any particular land until the line of the railroad is definitely fixed by filing a proper map in the local Land Office. When the line of the railroad is established the limits of the grant also become established. Because the grant is of a right-of-way one hundred feet wide on each side of the central line of said railway, the limits of the right-of-way are determined solely by reference to a fixed line and that fixed line is established by the filing of the proper maps in the local Land

Office. Since it is the fixing by the railroad of the line which it will follow which determines the grant of the right-of-way, it is appellant's contention that the railway's rights depends entirely upon the map which does in fact indicate the line which the railroad is actually constructing. It is apparent that the railway company is building according to the line shown upon the second map. This is shown by the relinquishment filed by the company as to the rights acquired under the 1907 map. (See Exhibit "C", p. 38 of the transcript.) We contend that when the old line is abandoned and the railway unequivocally shows that it is not building according to that old line, all rights by virtue of the old line and by virtue of the old map must fall. The right-of-way fixed and determined by the old map and by the old line shown in said map must as a matter of course be lost to the railroad when it announces its intention of abandoning the line which fixes the right-of-way. Or the reverse of the same proposition is this: that when a railroad desires to change its mind as regards the line which it will build and to that end files a new map and initiates its rights again, then the right of the railroad in and to the right-of-way for the construction of said line must depend upon the map which describes that line.

The railway company, while conceding that it is building its railroad according to the new route, claims title to the right-of-way by virtue of the old route.

Since the two lines are twenty feet apart there is

a portion of the old right-of-way which appellee admits has been lost. It disclaims any interest in twenty feet of the old right-of-way. There is no reason to support the contention that the railroad may relinquish a part of the right-of-way and retain the rest. There is nothing in the law which permits dividing the right-of-way into shreds. The acquisition of the old right-of-way depended upon the establishment of a line. The abandonment of that line causes the whole right-of-way to fall.

Let us inquire how came the twenty feet to be lost to the railroad. It became lost because the railroad formally announced its intention of changing its line and since the old route was abandoned the right-of-way and the whole of the right-of-way fell with it. From an examination of the amended map the Court will notice that in some instances the old line and the new line are separated by many hundreds of feet. In such instances the railroad's rights depend solely upon the new line. If, then, on both sides of appellant's land the rights of the railroad depend entirely upon the new map showing the new line, do not all of the portions of the road where the right-of-way has been changed depend upon the same map, namely, the map according to which the road is being built?

Let us examine the situation from another point of view. Suppose that appellant had not acquired an intervening right in that particular land in question and that at the time of the filing of the new map the land was still a part of the public do-

main, the railroad would then claim to own two hundred feet across said land by virtue of the new map. It would not refer to the old map whatsoever. It cannot be true that the rights of the railroad to twenty feet of appellant's land is derived from one map, and the right to one hundred and eighty feet is derived from another map.

To prove that the rights of the railroad must depend upon the map, according to which the road is being built, let us take another example. Suppose the limits of the right of way under the new line overlapped upon the limits of the right-of-way under the old line to the extent of only twenty feet, could it be contended that the railroad then owned twenty feet of right-of-way under the old line and one hundred and eighty feet under the new? Suppose that on this particular tract of land the old line and the new line crossed at right angles, would the railroad be able to contend that it owned a rectangular piece of right-of-way at the intersection of the two lines by reason of the old map, and owned all the rest of the right-of-way under the new map? These illustrations show clearly that the right-of-way of the railroad must depend entirely upon a single map and that map, of course, the map according to which the line is being built.

While Exhibit "B" is called upon its face an amended map of definite location, it is in fact not an amendment but a completely new map. Each step for the acquisition of the right-of-way according to that map was taken in the same manner that would

have obtained had it been the only map ever filed. The appellee did not attempt to amend simply those portions of the road in which it became necessary to construct its railroad beyond the limits of the old right-of-way. It made no request in such particulars to amend its line, but it has filed a completely new map showing a completely new line. Having thus initiated the procedure all over again, it should not now be permitted to say that it still claims title under a map which has been in fact abandoned.

The true test to determine the date of acquiring the right to build its road across the public lands is found by determining the date of filing the map of the final and ultimate line adopted by the railroad for the actual construction of the road. The right of the railroad can never depend upon various maps showing various lines or routes. There must be one and only one map which fixes the right of way. It follows irresistibly that the rights of the railway in all of the sections of land must depend upon the same map.

In the case of *United States v. Minidoka etc. S. W. R. Co.*, 190 Fed. 491, it was held that the approval of the map by the Secretary must be obtained before the road can be built. All rights are suspended until such approval is obtained. In order to determine the exact legal effect of filing the second or amended map, let us consider what were the rights of the railroad company prior to the approval of said second map. We have seen that in

the case of *Stalker v. Oregon Short Line etc. Ry. Co.*, 225 U. S. 142, that the approval of the Secretary relates back to the filing of the map. The approval by the Secretary of the second map could relate back only to the date of filing the map, which he approved. Since the right of the railroad to build the line at all dates from the filing of the amended map in 1909, the rights of the railroad in and to the right-of-way determined by the amended map must date from the same time.

It appears from the transcript of the record, p. 29, par. III that the appellant obtained a patent to the land in controversy in which no reservation of any right-of-way was made. Since this patent was issued after the filing of the second or amended map of location, it is apparent that the officials of the Land Office have construed the amending of the line as a waiver of all rights under the old line as to the portions amended. The issuance to appellant of a patent to all of the land in controversy without reserving any right-of-way for railroad purposes is an adjudication by the executive department that the rights of the railroad date from the filing of the new map and are inferior to those of the appellant.

See

Smith v. Northern Pacific, 58 Fed. 513.

In *Missouri etc. Ry. Co. v. Cook*, 163 U. S. 491, the Court ruled under a grant in aid of a Kansas railroad that the rights were determined by the

filing of the map, and in refusing to discuss the effect of deviations upon the grant, said:

“Whatever the rights of the company in this regard, such a change could not affect the rights of third parties which had in the meantime lawfully intervened.”

In *Washington & I. Ry. Co. v. Coeur d’Alene R. Co.*, 160 U. S. 77, the court held that the railroad could construct upon a different line from the one contained in the map, if rights of third parties had not intervened. In all cases it is the act which definitely fixes the line which determines the grant, and the line fixed by the map is presumed to be the line which the road will follow, and when the road desires to change the line and fix a new one, then its rights are determined in the same way by the date upon which that new line becomes fixed and certain. In other words, the grant from the Government to the railroad to build along the new line does not operate until that new line is definitely fixed.

In *Union Pacific v. Harris*, 215 U. S. 386, the railroad claimed right-of-way under several special acts, the last in 1866. The first act prescribed certain definite routes, and it was only in the Act of 1866 that the route was authorized which crossed the land in dispute. The railroad claimed by reason of the earlier laws, but the Supreme Court, in speaking of the date of the grant, said: “But that date must be found in an act prescribing the finally adopted route.”

And so in the case at bar, the date of the grant to the railroad must be found in the date of the filing of the map which finally prescribes the exact route which is to be followed, and where the exact route upon which the railroad will be built is first definitely fixed by the new map, then the only right to pursue that line is derived from that new map. See *Montana Ry. Co.*, 21 L. D. 250.

CONCLUSION.

For the two foregoing reasons we earnestly insist that the decree dismissing the bill of complaint in this cause was wrong; that the decree of the lower Court should be reversed, and that the District Court should be instructed to grant an injunction as prayed for in the bill of complaint.

Respectfully submitted,

C. J. FRANCE,
FRANK P. HELSELL,
Solicitors for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

GEORGE M. TAGGART,	} No. 2304
Appellant,	
vs.	
GREAT NORTHERN RAILWAY	
COMPANY, a corporation,	} Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Appellant's statement of the case is not as complete as might be desired. It contains one or two argumentative assertions which, taken alone, might be misleading to the court. To avoid any chance of a misunderstanding of the controversy between the parties, we desire to make a brief statement of the facts in the case, supplementing and correcting that contained in appellant's brief.

The rights claimed by the appellee are based upon the approval by the Secretary of the Interior of the map filed by the Washington & Great Northern Railway Company on January 2, 1907, some nine months before appellant made his homestead settlement on the land involved in this action. Unless the approval of that map was unauthorized (a point to be considered in the argument) the railway company thereby acquired a right of way across the land entered by the appellant, 100 feet wide on each side of the central

line of its road; for, under the decision in the case of *Stalker v. Oregon Short Line R. Co.*, 225 U. S., 142, the approval of the Secretary of the Interior related back to the date of the filing of the map.

After the approval of this map, and the transfer of all rights thereunder by the Washington & Great Northern Railway Company to the appellee, the Great Northern Railway Company revised the survey and location shown thereon, and on July 31, 1909, filed maps of such revision and of amended definite location of the railway line. These maps were approved July 13, 1912. Before their approval, or, to be exact, on January 12, 1912, the appellee was requested to file "a relinquishment under seal, of all rights under the original approval of said map filed by said Washington & Great Northern Railway Company, as aforesaid, as to the portions thereof amended in said Great Northern Railway Company's map of amended definite location." (Transcript, p. 32).

This relinquishment was requested pursuant to section 19 of the Circular of the General Land Office issued on May 21, 1909, reading as follows:

"When the railroad is constructed, an affidavit of the engineer and certificate of the president must be filed in the local office, in duplicate, for transmission to the General Land Office. No new map will be required *except in case of deviations from the right of way previously approved*, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms,

changed to agree with the facts in the case. The map must show clearly the portions amended, or bear a statement describing them, and the location must be described in the forms as the amended survey and amended definite location. In such cases the company must file a relinquishment, under seal, of all rights under the former approval, *as to the portions amended*, said relinquishment to take effect when the map of amended definite location is approved by the Secretary of the Interior.” (Transcript, p. 33).

Complying with this rule, the Great Northern Railway Company relinquished to the United States “all its right, title, and interest in and to the right of way pertaining to the line of railway shown upon the maps filed by the Washington & Great Northern Railway Company, and approved by the Secretary of the Interior on the 23d day of March, 1908, as aforesaid, acquired under and by virtue of said approval, excepting and excluding, however, any and all of such right of way that is or may be situated within the limits of the right of way pertaining to the revised and re-located line of said company’s railway, shown upon the maps thereof, filed in the United States District Land Office at Waterville on the 31st day of July, 1909.” This relinquishment, by its terms, became effective upon the approval of the map of amended definite location. (Transcript, pp. 39, 40).

In this connection, we wish to correct one or two erroneous statements in the appellant’s brief. At the top of page 6 it is stated that “the appellee filed a re-

lease and relinquishment of its right, title and interest in the right of way delineated by its first map;" and on page 11, in the first sentence of the second paragraph, reference is made to the company's "relinquishing all rights in the map of alignment of 1907." These statements are, of course, incorrect, as the instrument is very specific in relinquishing only that portion of the right of way acquired by the original approval falling outside the 200 foot right of way pertaining to the revised center line.

The revised line, in some instances, is identical with the original survey. At other points the deviation is slight. In a few places, the line shown on the 1909 map is outside the original 200 foot right of way. Across the land in controversy, the center line shown on the map of 1907 is located from 13 to 23 feet easterly of the center line shown on the map of 1909. Accordingly, the relinquishment operated to release from the original 200 foot right of way, a strip varying in width from 13 to 23 feet along the easterly edge thereof. At the bottom of page 25 of appellant's brief the statement is made that "as to the land owned by appellant the two lines of railroad are separate and distinct," and that "the two lines are about twenty feet apart." If counsel mean that the center lines are about twenty feet apart, their statement is correct, but not if they refer to the rights of way. The two lines of railroad overlap to the extent of approximately 180 feet. This 180 foot strip constitutes the land involved in this controversy. The stipulation of facts upon which the cause was submitted, contains the following paragraph:

“That the only land in said Lot 4 which said defendant proposes to occupy in the construction, maintenance or operation of its railroad across said Lot 4, is a strip of land about 180 feet in width, being all that part of a strip of land 100 feet wide on each side of the center line shown in the map of definite location filed January 2, 1907, located and remaining within the lines of a strip 100 feet wide on each side of the center line shown on the map of amended definite location filed July 31, 1909.” (Transcript, p. 36).

ARGUMENT.

Appellant contends that the railway company has no right to build its railroad across his homestead for two reasons:

First, that the map filed by the Washington & Great Northern Railway Company on January 2, 1907, which was approved by the Secretary of the Interior on March 23, 1908, was not "a profile of its road" as that term is used in the act of March 3, 1875, and therefore its approval was unauthorized:

Second, that if a right of way was acquired by the filing and approval of that map, the railway company, by the filing of the map of July 31, 1909, showing a slightly different center line across the land in controversy, lost all rights acquired by the filing and approval of the original map.

We will consider these questions in their order.

I.

The 1907 Map Conformed to the Requirements of the Act.

The whole of appellant's argument is based upon a misapprehension of the sense in which the word "profile" is used in Section 4 of the Act of March 3, 1875. Counsel assume that the word was used by Congress in a secondary, technical and restricted sense, and have omitted, in their references to the dictionary, to quote those portions of the definitions showing the primary meaning and use of the word. Those portions of the definitions quoted refer to the technical meaning of the word "profile" in the profession of civil engineering. The omitted parts of the

definitions show that the word has a much broader meaning in general use.

“Profile: 1. *An outline or contour*; as the profile of an apple. 2. A human head seen or represented sidewise, or in a side view; the side face or half face; a side or sectional elevation, as (a) *Arch.*, a section of any member at right angles with its main lines; (b) *Civ. Eng.*, a drawing showing a vertical section of ground along a surveyed line or work; (c) *Fort.*, any section of a fortification made by a vertical plane, perpendicular to the principal lines of the work.”

Webster’s International Dictionary, 1909.

“1. *An outline or contour*; a drawing in outline.

“2. The outline of a vertical section through a country or line of work, showing actual or projected elevations and hollows; generally with the vertical scale much greater than the horizontal.”

Standard Dictionary, 1909.

“1. *An outline or contour*; specifically the largest contour of anything, usually seen in or represented by a vertical longitudinal section or side view. . . . (d) in engineering and surveying, a vertical section through a work or section of a country to show the elevations and depressions.”

Century Dictionary, 1911.

“1. *A drawing or other representation of the outline of anything.* . . . 4. A sectional drawing, generally vertical.”

Oxford Dictionary, 1909.

These definitions show that the unanimously accepted primary meaning of the word "profile" is "an outline or contour." It is only when technically used in the profession of civil engineering that the word has the restricted meaning contended for by appellant. Furthermore, it is a significant fact that only in the late dictionaries is this technical meaning of the word given. For instance, Webster's Unabridged Dictionary of 1887 (the earliest dictionary to which we have had access), defines the word thus:

"1. *An outline or contour.* 2. *Paint. & Sculpt.*, a head or portrait represented sidewise, or in a side view, the side face or half face. 3. *Arch.*, the contour or outline of a figure, building or member; a vertical section."

We may admit counsel's assertion that any civil engineer will answer readily that a profile must of necessity show depressions and elevations, but it does not necessarily follow that Congress used the word in the sense in which it is employed by civil engineers. On the contrary, it is much more likely that the word was used in its ordinary sense. It is fair to presume that a general act of the character of the law of March 3, 1875, would be framed by Congress only after conference with the officials of the Land Department, to whom its administration was to be entrusted; and it is to us almost conclusive proof of the correctness of our position, that the Land Department has always construed the act as it was construed by Judge Rudkin.

On March 9, 1878, a Circular of Instructions under the act was issued by the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, containing the following paragraph:

“Upon the location of any section of the line of route of its road, not exceeding twenty miles in length, the company must file with the Register of the land district in which such section of the road, or the greater portion thereof, is located, a map, for the approval of the Secretary of the Interior, showing the termini of such portion of the road, its length, and its route over the public lands according to the public surveys.”

Copps Public Land Laws 1882, p. 818.

The map here described is a map showing the center line of the railway, and not a “profile”, in the technical sense for which appellant contends. Such a map would not show the termini of the road, its length or its route over the public lands, according to the public surveys, nor could the department determine therefrom the several tracts of land over which the right of way was sought to be acquired, and which were to be disposed of, under the act, subject to such right of way.

The departmental instructions of March 9, 1878, quoted above, were carried bodily into the circular of November 7, 1879, (*Copps Public Land Laws* 1882, p. 724,) and into the circular of January 13, 1888, (12 L. D., 423.)

Since 1898 the requirement of the department has

been specific that a map of alignment, and not a profile, in the technical sense, is intended by the act of 1875.

“The word ‘profile’ as used in this act is understood to intend a map of alignment. All such maps and plats of station grounds are required by the act to be filed with the register of the land office for the district where the land is located. They must be drawn on tracing linen, in duplicate, and must be strictly conformable to the field notes of the survey of the line of route or of the station grounds.”

Subdivision 6 of Circular of November 4, 1898,
27 L. D., 665.

Subdivision 6 of Circular of February 11, 1904,
32 L. D., 485.

Subdivision 6 of Circular of May 21, 1909, 37
L. D., 790.

We believe the court will concur in the conclusion of the District Judge, that this construction of the law by the officials charged with its administration, has been acquiesced in by all the departments of the government for so long a period that it should now be accepted by the courts.

“The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. *Edwards v. Darby*, 12 Wheat., 210; *U. S. v. Bk.*, 6 Pet., 29; *U. S. v. Macdaniel*, 7 Pet., 1. The officers concerned are usually able men and mas-

ters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret.”

United States v. Moore, 95 U. S., 760, 763; 24 L. Ed., 588.

“Those adjudications, covering a consecutive period of nearly nine years, and, so far as can be gathered from the printed reports of the decisions of that Department relating to public lands, being the only ones bearing upon the subject, ought to be taken as showing conclusively the meaning attached to the phrase ‘land subject to periodical overflow’, by the officers of the Department whose duty it is, and has been, to administer the swamp-land grant.

Moreover, if the question be considered in a somewhat different light, viz., as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons.”

Heath v. Wallace, 138 U. S., 573; 34 L. Ed., 1063.

The rule thus enunciated has especial application where such construction has been acted upon, and

those relying upon it would be prejudiced by a change and rights be devested.

“Such has been the uniform construction given to the acts by all departments of the government. Patents have been issued, bonds given, mortgages executed and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this late day be called in question.”

U. S. v. Burlington, etc., R. Co., 98 U. S., 334;
25 L. Ed., 198.

“‘It is the settled doctrine of this court’, as was said in *United States v. Alabama G. S. R. Co.*, 142 U. S., 615, 621; 35 L. Ed., 1134, 1136, 12 Sup. Ct. Rep., 308, ‘that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.’ These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging

that it had misconstrued the act of July 2d, 1864.”

Hewitt v. Schultz, 180 U. S., 139; 45 L. Ed., 463.

It is asserted in several places in appellant's brief that the only meaning of the word “profile” is that which appellant contends should be affixed to it in the act of March 3, 1875, and a number of cases are cited in support of the well recognized proposition that contemporaneous and practical construction may be used as an aid in determining the meaning of a statute, only when the statute is ambiguous. These premises are made the basis of the conclusion that the courts will not follow the Interior Department in its construction of the act. But we have shown that the major premise is incorrect, and consequently the conclusion is fallacious. Were it true that the word “profile” is one of the very few words which have but one single, clear, distinct meaning, as counsel say in their brief, the principle mentioned would be applicable; but, as we have shown, not only is the term one of many definitions, but the meaning which counsel contend should be given it in the act of 1875 is not that in which it is ordinarily used, but is a restricted and technical meaning, and, furthermore, one which has apparently but recently come into use.

The subsequent legislation of Congress also shows that the word “profile” as used in the act of March 3, 1875, means a map showing the route of the road over the public lands, and not a map showing the grades. Section 5 of the original act provides:

“That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands specially reserved from sale, unless such right of way shall be provided for by treaty stipulation, or by act of Congress heretofore passed.”

The effect of this section was altered by the act approved March 3, 1899, 30 Stat., 1233; 6 Fed. Stat. Ann., 513, providing:

“That *in the form provided by existing law*, the Secretary of the Interior may file and approve *surveys and plats* of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby.”

It is evident that this act was designed to permit the location and acquisition of railroad rights of way across lands included within forest reservations and reservoir sites, which was not permissible under the original act. It seems almost too clear for argument that the words “surveys and plats” in the act of 1899 are used with the same meaning as the word “profile” in the act of 1875. The latter act is simply a supplement and extension of the former. Its administration is the same. The “surveys and plats” are to be filed and approved in the form provided by existing law. The use of the words “surveys and plats” shows clearly that no “profile” in the technical sense is required when the railroad crosses forest reserves

and reservoir sites; and it is hardly logical to assume that Congress would require a different map in those cases than in others.

Appellant calls attention to the rule of strict construction which applies to the grant of gifts and privileges from the government, and argues that by analogy it should be the policy of the courts to enforce a strict compliance with the conditions required to be performed by the grantee, to obtain the benefits of such grants. But the grant under consideration here is not in the nature of a bounty or subsidy; it is not even in the class with the numerous grants made by Congress in aid of works of public improvement. Nothing more is granted by the act of 1875 than a mere right of way across unoccupied public lands, which the government was undoubtedly as anxious to see settled as were the railway companies. This is clearly brought out in the case of *U. S. v. Denver etc. Ry. Co.*, 150 U. S., 1, where the court said:

“The general nature and purpose of the act of 1875 were manifestly to promote the building of railroads through the immense public domain remaining unsettled and undeveloped at the time of its passage. It was not a mere bounty, for the benefit of the railroads that might accept its provisions, but was legislation intended to promote the interests of the government in opening to settlement and enhancing the value of those public lands through or near which such railroads might be constructed.”

Perhaps the most familiar rule employed in the

construction of statutes is that the legislative meaning is to be determined from the statute as a whole. Every part is to be construed with reference to every other part, and every word and phrase in connection with the context, and that construction sought which given effect to the whole of the statute. A construction which makes its different parts inconsistent with and antagonistic to each other is to be avoided.

“The whole statute must be examined. Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together.”

Pollard v. Bailey, 20 Wall., 520; 22 L. Ed., 376.

“In the exposition of statutes, the established rule is that the intention of the lawbaker is to be deduced from a view of the whole statute, and every material part of the same.”

Kohlsaat v. Murphy, 96 U. S., 153; 24 L. Ed., 844.

“Every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.”

Market Co. v. Hoffman, 101 U. S., 112; 25 L. Ed., 782.

“There is no mode by which the meaning affixed to any word or sentence, by a deliberative body, can be so well ascertained, as by comparing it with the words and sentences with which it stands connected.”

Wheaton v. Peters, 8 Pet., 591; 8 L. Ed., 1055.

Appellant asks a constriction of one word in section 4 of the act of March 3, 1875, which would nullify practically the entire balance of the section. The court will recall that this section provides that upon the approval of the profile of the road, "the same shall be noted upon the plats" in the local land office," and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." If the profile called for by this section is, as appellant urges, only a map showing the grades of the road, it is apparent that no effect can be given to the rest of the section; for such a map would not show the sections and subdivisions of the public lands crossed by the road. As a matter of fact, it would be utterly unintelligible, for a profile map, as the term is used by civil engineers, does not even serve to show the grades of a surveyed line of road, except when read in connection with a map showing the route of the road. A map showing nothing more than an undulating line representing the grade of a projected railroad, would convey no more meaning than that a railroad with that grade was to be built somewhere in the land district.

It is apparent that the Secretary of the Interior could never intelligently approve such a map, and that the railroad could not be noted upon the plats in the district land office for the information of prospective settlers. And yet counsel asks this court to assume that Congress intended that a map of this character—meaningless and unintelligible to every

one—should be filed by railroads seeking rights of way across the public lands.

It is asserted that had a profile of the road been filed in the local land office prior to the initiation of appellant's homestead entry, information could have been obtained showing the elevations of the railroad across the land entered, and appellant's irrigation system could have been adjusted to the elevations shown in the profile, and other valuable information as to the cuts and fills across said land would have been available. But we have already shown that the statement is unfounded in fact. If the railway company had filed such a map as appellant contends should have been filed, he could not have determined whether the railroad crossed his land at all.

Apparently appellant would have the court believe that he was misled in laying out his farm, by the fact that no profile was filed. But the allegations of his bill show that he never inquired at the land office to determine whether any railroad had been surveyed across his land. He alleges in paragraph two of his bill that upon the allowance of his homestead entry, he entered and resided upon the land and improved the same by the cultivation of the soil, by the erection of farm buildings, by the planting of seventeen acres of fruit trees, and the installation of a pumping system for irrigation purposes. In paragraph five it is alleged that the construction of the railway will take at least 224 fruit trees, and interfere with, and disturb the appellant's irrigation system. If appellant

had taken the trouble to inquire at the land office whether a railroad had been located across the land entered by him, he would have learned that a right of way map had been filed by the predecessor of the appellee, and would certainly have ascertained its location, and refrained from planting fruit trees upon the right of way.

We realize that these considerations cannot operate to alter the terms of the statute, and that if the act required the filing of a profile, as contended for by appellant, the fact that he was not misled by the alleged failure of the company to comply with the statute, cannot operate to impair his rights, or to enlarge ours. We do not advance the argument for that purpose. We mention it simply to show that his claim that he has been misled, is not made in good faith.

Appellant calls attention to the fact that the Great Northern Railway Company did file a profile, showing the grades of its revised line, and would evidently have the court believe that such map was filed as a compliance with the act of 1875. The agreed statement of facts shows that this profile was requested for a purpose entirely disconnected with the act of 1875. Paragraph 13 of the stipulation, appearing at pages 34 and 35 of the transcript, shows that the Washington & Great Northern Railway Company was never called upon or requested to file any profile of the line shown on the map of 1907, and that the Great Northern Railway Company was never called upon or requested to file any profile of the line shown on the

amended map of 1909, until November 17, 1910, "when the Secretary of the Interior requested the Register and Receiver of the Land Office at Water-ville to notify said defendant that since the line of its road, as described in said map of amended definite location, crossed certain lands suitable for power sites, which had been temporarily withdrawn from entry or sale, said Great Northern Railway Company would be required to file a profile, showing the elevations and depressions at which the line of its said railway crossed said lands", and that in response to this request the company filed a profile, showing the grades of its entire line. This profile was called for at the instance of the United States Geological Survey, so that that Bureau might determine whether the use of the withdrawn lands as power sites would be affected by the proposed railway.

The chief reliance of the appellant seems to rest in the case of *U. S. v. Minidoka etc. R. Co.*, 190 Fed., 491, where this court took occasion to say that the profile mentioned in the act "is something more than an alignment map, or a map of definite location." It is clear, however, from the opinion of this court and of the Circuit Court (176 Fed., 762) in that case, that no question as to the character of the map required to be filed was presented in the case, and hence the remarks of the court upon that subject were purely *dicta*. That suit was brought by the United States to restrain the defendant from going upon certain reserved lands withdrawn for the purpose of irrigation and reclamation, and constructing a railroad thereon

without the approval of the complainant.

That the railroad company had filed no map of any kind is apparent from the following excerpt from the opinion of this court:

“It is contended by the Railway Company that having filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, it has placed itself in a position to become a grantee under the act, and having staked and laid out its road across the lands in question, and having established and partly constructed a grade, a right of way has been secured under the act, *notwithstanding no profile of the road has been filed with or approved by the Secretary of the Interior,*”

and from the following statement in the opinion of the District Judge:

“Apparently for the purpose of claiming some benefit under the railroad right of way act of March 3, 1875, prior to the commencement of this suit and after the definite location of its line of road, the railroad company filed with the Secretary of the Interior a copy of its articles of incorporation and proofs of its organization under the same. *It has not, however, filed any profile map with the register of the local land office.*”

Thus, it clearly appears that the railway company claimed the right, as against the United States, to construct its road across the public lands, upon the filing of a copy of its articles of incorporation and

proof of its organization under the same, without the filing with, or approval by, the Secretary of the Interior, of any map of any character.

Judge Rudkin, in referring to the *Minidoka* decision, quotes from the opinion of this court as follows:

“The defendant railroad in this case filed with the Secretary of the Interior a copy of its articles of incorporation and due proof of its organization under the same, but has filed no profile map of its road with the register of the land office where the land is located, and no such profile map has been filed with or approved by the Secretary of the Interior,”

and with respect thereto, says:

“I take it from this that no map of any kind was filed in that case, and that the court did not have before it the validity or sufficiency of the regulations promulgated by the Secretary of the Interior or a map filed in compliance therewith. If it had, I doubt very much whether it would have declared invalid regulations and maps, the validity of which have been recognized and acquiesced in for so long a period, for later in its opinion the court referred to the general authority conferred upon the Secretary of the Interior by the various acts of Congress relating to the public lands, and said:

‘All this is clearly included in the authority of the Secretary to approve or disapprove the profile of the road. . .’

And:

‘We think the approval of the conditions upon which the railroad company may have a right of way through the lands of an irrigation project is imposed by the statute on the Secretary of the Interior as a judicial act to be evidenced by his approval or disapproval of the profile map.’ ”

The opinion of the District Judge leaves little to be added. It is apparent from the statement of the court in the opinion in the *Minidoka* case that something more than a map of alignment is required to be filed was made without argument or the citation of authorities upon that point by counsel, and without reference by the court to the subsequent legislation of Congress, and the uniform and long-continued construction of the act by the Interior Department, recognizing that the word “profile” as used in the Act of 1875, means simply a map showing the outline of the railroad, and its course over the public lands.

In the *Minidoka* case title to the lands in question was still in the United States, and it was claimed by the Government that the failure on the part of the railroad company to file its profile was a condition precedent to the right of a railway company to enter upon the lands at all. In this case the filing of a profile, if it could be claimed that a profile had not been filed, was a condition subsequent, and the failure to so file, can not be taken advantage of by appellant, but can only be taken advantage of by the Government in a proceeding brought for forfeiture on account of failure to comply with the terms of the grant.

S. & B. C. Ry. v. W. & G. N. Ry., 219 U. S., 166.

This point will be more fully considered in the second section of our argument.

Appellant cites the cases of *Rio Grande W. R. Co. v. Stringham* (Utah), 110 Pac., 868; and *Chicago, K. & N. R. Co. v. Van Cleave*, (Kansas), 33 Pac., 472, as showing that it has been the custom of some companies to file both a profile of the road and a map of alignment. It is true that in these cases there are references to filing "a map and profile", but a very casual reading shows that the expression is simply a tautological way of saying that the company filed a map, showing the outline of its road. In neither of these cases was the character of the map filed by the railway company at issue, and by the court's reference to the "filing of a map and profile" nothing more is to be understood than that the company had filed a map in compliance with the act. This is particularly clear in the *Van Cleave* case, where the court, referring to the case of *Noble v. Union River Logging Co.*, 147 U. S., 165, in which the opinion distinctly states that the company filed a map showing the termini of the road, its length and its route through the public lands, says:

"The attention of the court was directed to the question whether on the approval of the map and profile by the Secretary of the Interior, the company's rights became fixed".

The decisions of the Supreme Court and other courts, show that the profile required by section 4 of

the act, is not a technical "profile map", as the term is employed by civil engineers, but simply an outline of the road, showing its definite location across the public lands. We think counsel for appellant will agree with us that there is no case in which the character of the map filed has been directly in question, but the casual remarks of the judges in a number of cases, show that they regard the act as requiring the filing of a map, showing the definite location of the railway, and not a profile showing the grades only.

Thus, in *Jamestown & N. R. Co. v. Jones*, 76 N. W., 227, affirmed in 177 U. S., 125, the court said:

"Sections 3 and 4 treat such settler who has made his settlement prior to the approval of the profile of the road, (which is nothing more than a map of definite location), as possessing superior rights, which must be considered by the railroad company, the same as any other private property."

In *Jamestown, etc., R. Co. v. Jones*, 177 U. S., 125, and in *Minneapolis, etc., R. Co. v. Doughty*, 208 U. S., 251, while the court speaks of the map required as "a profile", it nevertheless finds that after the filing of the articles of incorporation and proofs of organization, the essential act required is "the definite location" of the railroad, and that this may be done either by the construction of the road, or the filing of the map.

That a map of definite location is what the act requires is further shown by the decision of the Supreme Court in the recent case of *Stalker v. Oregon*

Short Line R. Co., 225 U. S., 142, 56 L. Ed., 1027, where the court indiscriminately uses such expressions as “map of alignment”, “map of location”, map showing the termini of such portion and its route over the public lands”, etc.

The Approval By the Secretary of the Interior of the Map Filed By the Railway Company Was a Judicial Act, Constituting An Adjudication of the Sufficiency of the Map, and Is Not Subject to Review in a Proceeding of This Character.

This proposition is established by the decision in *Noble v. Union River Logging Railroad Co.*, 147 U. S. 165, 37 L. Ed. 123, which was an action to restrain the Secretary of the Interior from executing an order revoking his predecessor's approval of the Union River Logging Railroad Company's maps for a right of way over the public lands. The defendant asserted the right to revoke the approval of the maps upon the ground that, since the railroad company was operated solely for the transportation of logs for the private use and benefit of the persons composing the company, it was not entitled to the benefits of the right of way act of March 3, 1875, and hence that the approval of its right of way map by the former Secretary of the Interior was made without jurisdiction, and was therefore void. But the court held that the approved map was equivalent to a patent, and that the title which vested upon the approval could be divested only by a decree of the court in a proper proceeding brought for that purpose by the United States. We quote at length from the opinion of the

court:

“At the time the documents required by the Act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, amongst other things, whether the railroad authorized by the articles of incorporation was such a one as was contemplated by the Act of Congress. Upon being satisfied of this fact, and that all the other requirements of the Act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done, the granting section of the Act became operative, and vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road.

“The position of the defendants in this connection is, that the existence of a railroad, with the duties and liabilities of a common carrier of freight and passengers, was a jurisdictional fact, without which the secretary had no power to act, and that in this case he was imposed upon by the fraudulent representations of the plaintiff, and that it was competent for his successor to revoke the approval thus obtained; in other words, that the proceedings were a nullity, and that his want of jurisdiction to approve the map may be set up as a defense to this suit.

“It is true that in every proceeding of a judi-

cial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity; such, for example, as the service of process within the state upon the defendant in a common law action. * * * There is, however, another class of facts which are termed *quasi* jurisdictional, which are necessary to be alleged and proved in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally. * * *

“We think the case under consideration falls within this latter class. The lands over which the right of way was granted were public lands subject to the operation of the statute, and the question whether the plaintiff was entitled to the benefit of the grant was one which it was competent for the Secretary of the Interior to decide, and when decided, and his approval was noted upon the plats, the first section of the Act vested the right of way in the railroad company. * * * The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose.”

Other cases to the same effect might be cited, but as they arose under other land laws, and the above case is squarely in point, we do not cite them here. Many of them are referred to in the opinion in the

Noble case. This case clearly establishes that the Secretary of the Interior, when called upon to examine the proceedings and proofs of railway companies seeking rights of way across the public lands, acts in a judicial capacity, and that his decision as to the sufficiency of the proofs is conclusive, and not subject to review in a collateral proceeding. Accordingly, it must be held that his approval of the maps filed by the predecessor of the appellee, constitutes in itself an adjudication of their sufficiency, which cannot be reviewed here.

The same principle is recognized in the opinion of this court in the case of *United States v. Minidoka, etc., R. Co., supra*, 190 Fed. 491, where it is said, at page 499:

“We think the approval of the conditions upon which the railroad company may have a right of way through the lands of an irrigation project is imposed by the statute on the Secretary of the Interior as a judicial act to be evidenced by his approval or disapproval of the profile map.”

For these reasons, it is respectfully submitted that the District Judge was right in holding that the map filed by the Washington & Great Northern Railway Company, and approved by the Secretary of the Interior, complied with the act of March 3, 1875, and entitles the railway company to construct its railroad upon the right of way described thereon.

II.

No Part of the Right of Way Acquired by the Filing and Approval of the Map of January 2, 1907, Has Been Lost, Except the Portion Voluntarily Relinquished By the Railway Company.

The court will recall that after the approval of the first map and the transfer of all rights thereunder by the Washington & Great Northern Railway Company to the appellee, the appellee revised the survey and location shown on that map, and on July 31, 1909, filed maps of such revision and of amended definite location of said railway line. Later, at the request of the Department of the Interior, and in compliance with its rules, the Great Northern Railway Company relinquished to the United States "all its right, title, and interest in and to the right of way pertaining to the line of railway shown upon the maps filed by the Washington & Great Northern Railway Company, and approved by the Secretary of the Interior on the 23rd day of March, 1908, as aforesaid, acquired under and by virtue of said approval, excepting and excluding, however, any and all of such right of way that is or may be situated within the limits of the right of way pertaining to the revised and relocated line of said company's railway, shown upon the maps thereof, filed in the United States District Land Office at Waterville on the 31st day of July, 1909."

We have pointed out, in our statement of the case, that the center line shown on the first map is located some twenty feet easterly of the center line shown

on the second map, across the land in controversy, and that the relinquishment operated, therefore, to release from the 200 foot right of way acquired by the approval of the 1907 map, a strip some twenty feet wide, along the easterly edge thereof. We also mentioned in our statement, that one of the stipulated facts in the case is that the appellee proposes to occupy, in the construction and operation of its railway line, only that portion of the original right of way lying and remaining within the right of way pertaining to the revised center line.

It is the appellant's contention that, since the appellee admits that it is constructing its line according to the revised location, shown on the amended map, "all rights by virtue of the old line and by virtue of the old map must fall."

As remarked by the District Judge, the right of way granted to the company by the Government could be disposed of only in two ways; first by the company's voluntary act, and second, by a forfeiture declared by the Government for breach of the conditions of the grant. It is clear that the appellee has not voluntarily parted with any portion of the right of way acquired by the approval of the first map, except the twenty foot strip which it relinquished to the United States. The only other question to be considered, therefore, is whether the filing of the map of amended definite location, and the construction of the railway according to the survey shown on that map, though still within the original right of way, amounts to an abandonment or waiver of the

rights acquired by the approval of the first map. We expect to show, first, that there has been no abandonment of the old right of way, or breach of the conditions upon which it was granted, and second, that even if there has been an abandonment, no one can assert it or take advantage of it, except the United States.

No rights across the appellant's homestead are claimed by the appellee by virtue of the approval of the map of amended definite location. Its claim is based solely upon the approval of the original map, and the fact that its railroad is being built on the right of way which it acquired thereby. Appellant's position seems to be that, since the railway company's second map showed the amended location of the entire line, from one end to the other, and not only those portions lying without the original two hundred foot strip, it has elected to abandon all rights under the first approval, and its right to construct the entire line must rest upon the approval of the second map.

Now, it is apparent that no right of way across the land entered by appellant could have been acquired by the filing of the second map, on July 31, 1909, without the condemnation of the appellant's interest therein, since he had settled upon the land in September, 1907. Clearly, therefore, the map of 1909 was not filed for the purpose of securing any right of way across these lands. Furthermore, under the regulations of the Interior Department, requiring the filing of a new map only "in case of deviation from the right of way previously approved," it is

apparent that even if the land had been unsettled, there was no necessity of filing a new map of the road, so far as these lands were affected, since the deviation amounted to only twenty feet, leaving the company eighty feet of right of way on one side of its center line, and one hundred and twenty feet on the other, which was ample for the necessities of the railway.

It may be inquired then, why the railway company showed its entire line on the new map, and not only those portions crossing unsettled lands, and lands where there was a deviation from the original right of way. The answer is that this was done in compliance with the act, requiring the maps to be filed in twenty mile sections, and with the regulations of the Interior Department, directing the maps to show "the termini of the line of the road," and "any other road crossed or with which connection is made." (See Circular of May 21, 1909, 37 L. D. 788.) It is apparent that a map showing the entire route would be much more convenient, both to prepare and to read, than a map showing detached sections.

In addition to these considerations, the company undoubtedly wished to secure a right of way one hundred feet wide on each side of the revised center line, even when the deviation from the old line was slight, across lands which had not been settled between the filing of the two maps. But that there was no intention of abandoning its rights under the original filing and approval, is clearly shown by the terms of the relinquishment, which reserved and ex-

cepted all the right of way pertaining to the old line, remaining within the limits of the right of way pertaining to the new.

Appellant asks whether, if the overlap on the two maps amounted to only twenty feet, the company could contend that it owned twenty feet under the approval of the old line, and 180 feet under the new. Answering this, we may say in the first place, that the case supposed is not parallel to the case at bar. A twenty foot overlap could only occur when the revised center line was moved 180 feet from the original survey, or 80 feet off the original right of way. In this case, the revised line remains on the old right of way, and the company's construction is confined to the right of way originally approved. But we are willing to answer the question squarely: First, if no rights had intervened between the filing of the two maps, there would be no necessity of claiming anything by virtue of the original approval, since the company's rights to the 200 foot strip pertaining to the revised line would be prior in any event to the rights of the settler. Second, if an intervening right had accrued between the approval of the two maps, and the company had not relinquished the original right of way, there is no question but that the railway company might claim title thereto as against the settler, and also as against the Government until a forfeiture of its rights under the original approval had been declared by the Government for failure to comply with the terms of the grant by constructing its railroad on the original right of way. This is a point

to be more fully discussed a little later in the brief.

It is unnecessary to discuss at length the other situation supposed by appellant's counsel, of two rights of way crossing at right angles. It is apparent that that would not be an amended definite location of the original line.

The contention of the appellant that the original right of way has been lost by deviating from the center line shown on the original map rests upon the argument that, because the grant is of a right of way "100 feet wide on each side of the central line of the railway," the limits of the right of way are determined solely by reference to the center line shown on the map; and that the right of way fixed and determined by the old map must be lost to the railway when it leaves the center line "which fixed the right of way."

The argument of appellant leads to this conclusion: that whenever a railway company deviates, even in the slightest degree, in the construction of its road, from the line shown on the map approved by the Secretary of the Interior, it loses all rights acquired by the approval. According to this argument, a deviation of one foot, is just as fatal as a deviation of twenty feet. The company must exactly follow the center line shown on the map; otherwise, all rights acquired by the approval of the map, are lost. This leads one to wonder why a right of way 200 feet in width was granted by Congress. A much narrower strip is required for the construction and operation of a railway line. It might be thought that the addi-

tional width was for station grounds, etc., were it not that section 1 makes ample provision for station buildings, depots, machine shops, sidetracks, turn-outs and water stations.

It is very probable that no railway was ever built strictly according to the line previously surveyed, no matter how careful the survey may have been. The construction engineer almost invariably finds that changes from the surveyed line are necessary, when the road comes to be actually graded. It is frequently found that a slight change here and there will operate advantageously in the disposition of material. A quantity of rock or earth taken from a cut may frequently be used in the construction of an adjoining fill, if a slight alteration in the center line is made, where otherwise the material would have to be secured elsewhere. It must have been in anticipation of contingencies of this character that the 200 foot strip was granted. That this has been the construction of the act in the Land Department is shown by the requirement of filing a new map only "in case of deviation from the right of way previously approved," contained in the Circular of May 21, 1909, 37 L. D. 788, heretofore quoted in full, and similar instructions in the earlier circulars issued under the act which we have referred to in the opening paragraphs of the argument.

Appellant cites the cases of *Missouri, etc., R. Co. v. Cook*, 163 U. S. 491, and *Washington & I. R. Co. v. Coeur d'Alene, etc., R. Co.* 160 U. S. 77, as having some bearing upon this issue, but examination of

those decisions shows that they are not even remotely in point. In both of those cases the Railway Company had deviated in the construction of its line to the extent of something like a mile, from the center line shown on the map of definite location, and the court held that the construction of the line under these circumstances could have no effect on the right of parties in the land crossed by the constructed line, which had intervened between the filing of the map and the building of the railway.

Even If the Facts Showed a Breach of the Conditions Upon Which the Original Right of Way Was Granted, Title Thereto Would Remain in the Appellee Until the Declaration By the Government of a Forfeiture of the Grant.

We have endeavored to demonstrate that no abandonment of the original right of way is shown by the fact that the railroad is being constructed according to the amended location shown on the new map. We now proceed to show that even if the facts did show an abandonment of the original right of way, no one could take advantage of it except the Government.

The granting act contains the following condition of forfeiture:

“Provided, that if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.”

Appellant's claim of abandonment rests upon an alleged breach of this condition, his argument being

that the construction of the road according to a different center line than that shown on the approved map, amounts to a failure to build the line under the authority granted..

The above and similar provisions in Congressional grants of lands and rights of way have often been considered by the Supreme Court, and in all the cases in which the question has been passed upon, the failure to complete the road within the time limited has been treated as a condition subsequent, not operating *ipso facto* as a revocation of the grant, but as authorizing the Government to take advantage of it, and forfeit the grant by judicial proceedings, or by an act of Congress resuming title to the lands.

Thus, in the leading case of *Schulenberg v. Hariman*, 88 U. S. 44, 22 L. Ed. 551, the Act of Congress granting lands to the State of Wisconsin to be sold and the proceeds applied in aid of the construction of a railroad, provided in what manner the sales should be made, and enacted that if the road were not completed within ten years no further sales should be made, and the lands should revert to the United States. That was decided to be no more than a provision that the grant should be void, if the condition subsequent were not performed. Mr. Justice Field, delivering the opinion of the court, said:

“It is settled law that no one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs, or the successors of the grantor, if the grant proceed from an artificial

person; and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. * * * And the same doctrine obtains where the grant upon condition proceeds from the government; no individual can assail the title it has conveyed on the ground that the grantee has failed to perform the conditions annexed."

A case in point upon both the facts and the law is *Bybee v. Oregon and California R. Co.*, 139 U. S. 663, 33 L. Ed. 305. The plaintiff was the owner of an interest in a ditch acquired under an Act of Congress "granting the right of way to ditch and canal owners over the public lands, and for other purposes." His occupation dated from the month of May, 1879. The railway company claimed the right to build its railroad across this ditch upon a right of way granted to it by Congress in 1866. The granting act, as amended, provided that the road should be completed by July 1, 1880, and that in case the company should not complete the road within the time limited "this Act shall be null and void, and all the lands not conveyed by patent to said company, at the date of any such failure, shall revert to the United States." The company did not complete the road within the time required by the act, and when, some time thereafter, it built its road across the plaintiff's ditch, he sued to recover for the damages to the ditch occasioned by the construction of the railroad, alleging that its rights were forfeited. But the court held that the company did not lose the power to take possession of

its right of way by its failure to construct its road within the time limited by the granting act, and that the lands granted did not revert, even though the condition upon which they were granted had been broken, until the assertion of a forfeiture by the United States.

The latest case dealing with the subject is *Spokane & B. C. R. Co. v. Washington & G. N. R. Co.*, 219 U. S. 166, 55 L. Ed. 159, in which the earlier cases are reviewed. The syllabus of that case, which correctly states the court's decision, is as follows:

“A breach of the conditions upon which a railway right of way was granted *in praesenti* by the act of June 4, 1898 (30 Stat, at L. 430 chap. 377), *viz.*, that the railway company shall commence grading within six months after the approval of the map of definite location, or its location shall be void, and that the right therein granted shall be forfeited unless the company shall construct 25 miles of road within two years after the passage of the act,—does not of itself work a forfeiture, but such conditions being conditions subsequent, there can be no forfeiture without some appropriate judicial or legislative action.”

The railway is now being constructed across the land entered by the appellant, within the limits of the right of way acquired by the approval of the original map. Unless it be held that a divergence of a few feet in construction from the center line shown on that map, is a failure to construct the road in accord-

ance with the terms of the grant, it is clear that not even the Government can declare a forfeiture. But if this deviation does constitute a breach of the conditions upon which the right of way was granted, amounting to an abandonment of the grant, it is established by the cases cited, and many others, that no one can take advantage of the company's failure to construct the line as required by the granting act, except its grantor, the Government. The appellant is not entitled to urge it. Until the United States sees fit to assert and enforce a forfeiture for breach of conditions, the title to the right of way remains unimpaired in its grantee.

No Significance Is to Be Attached to the Fact That Appellant's Patent Contained No Reservation of the Right of Way.

Reference is made in appellant's brief in several places to the fact that his patent contained no reservation of appellant's right of way, and in one place the statement is made that "the issuance to appellant of a patent to all the land in controversy, without reserving any right of way for railroad purposes, is an adjudication by the Executive Department that the rights of the railroad date from the filing of the new map, and are inferior to those of the appellant." In support of the latter statement we are invited to see *Smith v. N. P.*, 58 Fed. 513. Reference to this case shows that no such statement was made by the court, nor is there any intimation that any inference is to be drawn from the issuance of a patent, without reservations.

That no significance is to be attached to the issuance of a patent, without reservation of right of way, is shown by the act itself, which declares that after the approval of the right of way map and the notation of the railway line on the plats in the Land Office "all such lands over which such right of way shall pass shall be disposed of, subject to such right of way." In other words, the rights of a railway company and a settler entering the same land, are fixed by the act, and not by any conditions or recitals in their muniments of title.

In *Northern Pac. Ry. Co. v. Townsend*, 190 U. S. 267, 47 L. Ed. 1044, which was a contest between the railway company and the grantees of homestead settlers, involving title to a portion of a 400 foot right of way granted to the railway company, the court, referring to a contention that some significance was to be attached to the issuance of patents to the homesteaders without reservation of the railway company's right of way, said:

"At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands, subject to preemption and sale, and the Land Department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within

the right of way, because of the fact that the grant to them was of the full legal subdivisions.”

And in *Rio Grande Western R. Co. v. Stringham* (Utah), 110 Pac. 868, the court held that on approval by the Secretary of the Interior of the profile of the proposed railroad through public lands, in accordance with the act of March 3, 1875, the title to the right of way vested in the Railway Company, and the subsequent patent of land, including the right of way, though not made subject thereto, did not divest the title so acquired. The court said:

“Nor is it made to appear whether the mineral patent issued to Treweek in 1889 was in terms made subject to the right of way, but since section 4 of the act provides that ‘all such lands over which such right of way shall pass shall be disposed of, subject to such right of way’ it again will be presumed, in the absence of a showing to the contrary, that the subsequent disposition made to Treweek was subject to the right of way, and in any event since the title to the right of way vested in plaintiff’s predecessor, upon the secretary’s approval of the profile of its road, it matters not whether the subsequent grant to Treweek was or was not in terms made subject thereto, for the law itself made it so. *Rd. Co. v. Baldwin*, 103 U. S. 426, 26 L. Ed. 578; *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267, 47 L. Ed. 1044.”

The reason why the Land Department does not except railroad rights of way in patents to lands

crossed by them, is well stated in the Circular of Instructions under the act of 1875, issued May 21, 1909.

“1. *Nature of grant.*—A railroad company to which a right of way is granted does not secure a full and complete title to the land on which the right of way is located. It obtains only the right to use the land for the purposes for which it is granted and for no other purpose, and may hold such possession, if it is necessary to that use, as long and only as long as that use continues. The Government conveys the fee simple title in the land over which the right of way is granted to the person to whom patent issues for the legal subdivision on which the right of way is located, and such patentee takes the fee, subject only to the railroad company's right of use and possession. All persons settling on a tract of public land, to part of which right of way has attached, take the same subject to such right of way, and at the total area of the subdivision entered, there being no authority to make deduction in such cases. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of damages for right of way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of this department.”

37 L. D. 788.

We respectfully submit, in conclusion, that the

map filed by the Washington & Great Northern Railway Company on January 2, 1907, was a "profile" within the meaning of that term in the act of March 3, 1875; but that its sufficiency was established, in any event, by the approval of the Secretary of the Interior; that no part of the right of way acquired by the approval of that map has been lost or abandoned by the appellee, except the strip relinquished to the United States; that even if there had been an abandonment, the appellant could not assert it, nor anyone else except the Government. The District Judge was correct in concluding that the defendant is claiming nothing more than was granted to it by Congress, and the decree dismissing the complainant's bill should be affirmed.

Respectfully submitted,

F. V. BROWN,

CHARLES S. ALBERT,

THOMAS BALMER,

Solicitors for Appellee.

No. 2304

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE M. TAGGART,
Appellant,

vs.

G R E A T N O R T H E R N R A I L -
W A Y C O M P A N Y, a c o r p o r a -
t i o n,
Appellee.

Upon Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division.

REPLY BRIEF OF APPELLANT

ARGUMENT.

The Word "Profile" in the Act.

There are a few points made in the brief of appellee which must be met by appellant in order that the real issues of law in this appeal may not be obscured.

Appellee cites several definitions of the word

“profile” which do not assist it in the least. After they are carefully read and digested it will become apparent that the word “profile” means just what this court said it meant in the case of *United States vs. Minidoka, S. W. R. Co.*, 190 Fed. 491. In other words, a profile of a railroad is a vertical section showing elevations, depressions and grades. It would be impossible to make any of the definitions quoted by appellee apply to the map of alignment filed by the railway company in January, 1907.

Appellee insists that a profile map could not be noted upon the plats in the local land office. There is nothing in the record or as a matter of fact which will justify such a statement. This court will not assume that a profile map of a railroad would be a wholly unintelligible thing or that it would consist of a mere undulating line unattached to any particular subdivisions of the public land. Counsel argue that a map such as we contend for would be wholly unintelligible; that it would not show the subdivisions of the public lands crossed by the road. This statement we challenge. A profile map must of necessity refer to some particular section of land. It would not be complete if it did not do so. Appellee admits on page 20 of its brief that it did at one time file with the Register of the local Land Office at Waterville a profile of its entire line; that such a profile was filed for the use of the Geological Survey to enable that bureau to determine whether withdrawn lands would be affected by the railway. Will the appellee please explain how a profile could be of such use to the Geological Survey if such a map is

wholly unintelligible and does not in any particular refer to the subdivisions of the public lands. We arrive at the inevitable conclusion that a profile is different from a map of alignment and is a wholly *intelligible* and practical instrument. Instead of the construction contended for by appellant being restricted and technical as stated by appellee, it is obviously the only natural and common one.

Appellee relies strongly upon the fact that the Secretary of the Interior did not call upon the railway company for a profile until November 17, 1910. We can discover no reason why the Secretary of the Interior should be under any obligation to call upon the railroad for the proper map at any time. The initiative should lie with the railroad. If it desires to obtain the rights granted by the acts of Congress it should comply with the requirements of those acts.

Another strange doctrine relied upon by the appellee is stated at the bottom of page 23 of its brief, i. e. that the filing of a profile is a condition subsequent and the failure to so file can only be taken advantage of by the government. This is a strange doctrine indeed. The appellee has no rights in this case unless the facts show that it has acquired a right-of-way under the Act of March 3, 1875, by a compliance with the terms of that act. In no other way can such a right be obtained. And yet appellee maintains that even though it has not filed a profile within the meaning of the act, still no advantage of that fact can be taken by appellant. Appellee does not seem to realize that it must show a compliance with the act. It is not a question of taking advantage of the

failure to file a profile. Rather it is the direct question, has a profile been filed? For if it has not then appellee never acquired any rights.

Attention is again called to the provisions of the law of March 3, 1875, in which words are used as follows:

“And *thereafter* all such lands over which such right-of-way shall pass shall be disposed of subject to such right-of-way.”

It cannot be denied that prior to the filing of a profile required by the act, rights initiated by a homestead entryman in the public lands are prior to those of the railroad. This is true because of the use of the word “*thereafter*” in the act. Instead of appellant not being able to take advantage of the fact that no profile was filed, appellee has the burden of showing that one was filed.

II.

The Effect of the Approval by the Secretary.

Appellee argues that the approval of the 1907 map by the Secretary of the Interior is an adjudication of the sufficiency of the map. It is difficult to see how the approval of an instrument can rise any higher than the instrument itself. The fact that a certain instrument was approved by the Secretary of the Interior is of no force whatever unless it can be shown that such instrument was the one required by law. The fact that the Secretary of the Interior has approved of a map of alignment is of no more importance than the Secretary's approval of a certified copy of the appellee's articles of incor-

poration. Since appellee can acquire no rights until it obtains the approval of the Secretary upon the very instrument required by the act, surely it cannot justify its trespass upon appellant's land by alleging and proving that it has obtained the approval of the Secretary to a different instrument. It must show something more than that it has obtained the approval of the Secretary to an instrument. It must show that that approval is attached to the very instrument required by law.

It is argued that the approval of the Secretary is a judicial act and the case of *Noble vs. Union River Logging Railroad Co.*, 147 U. S. 165, is cited. It is conceded that the approval of the Secretary upon the instrument required by the law is a judicial act in the sense that it is not ministerial. It is a judicial act also in the sense that when once given it cannot be revoked. The Noble case simply holds that the Secretary of the Interior cannot revoke his approval; that his approval is similar to the issuance of a patent and that if fraud has been committed in obtaining the approval resort must be had to the courts. This is far from a decision that the approval of the Secretary is an adjudication of the rights of settlers upon the public lands which conflict with those of the railroad. It must be remembered that the Secretary has issued to the appellant a patent in fee simple for the land claimed by the railroad in this action. Even if we were to concede that the railroad had in this case filed a profile map as required by law, it would still be a question

for the courts to determine between the grantees of the land office.

It would be strange indeed if a court should hold that although the act requires the railroad to provide the same rights could be obtained by another instrument and allowing the appellee the Secretary to that. It thus becomes a question that it is incumbent upon the court to determine an original proposition whether the Act of Congress has been complied with by the appellee.

III.

The Filing of the second Map.

Appellee states in substance that although building its line according to the route shown on the second map filed, it claims title to its right-of-way across appellant's land by reason of the first map. It explains frankly enough that the purpose of the company in filing its amended map across the land of appellant was undoubtedly to acquire a four hundred feet upon either side of the new line. It is apparent from this situation that the railroad claims one hundred feet on one side of the amended map which it is enabled to do so. It treats the amended map as a new indication of its rights, where the rights of a settler have not attached to both the right to construct as against the government and the title as against a settler date from the date of filing the second map. But when the rights of settlers have intervened it claims title to the original map. Surely such a double-barreled position will not be permitted. If the rights to

for the courts to determine as between conflicting grants of the land office.

It would be strange indeed if a court should hold that although the act requires the railroad to file a profile the same rights could be obtained by filing another instrument and obtaining the approval of the Secretary to that. It thus becomes apparent that it is incumbent upon this court to determine as an original proposition whether the Act of Congress has been complied with by the appellee.

III.

The Filing of the Second Map.

Appellee states in substance that although it is building its line according to the route shown in the second map filed, it claims title to its right-of-way across appellant's land by reason of the first map. It explains frankly enough that the purpose of the company in filing its amended map across the land of appellant was undoubtedly to acquire a full one hundred feet upon either side of the new line. It is apparent from this situation that the railroad claims one hundred feet on each side of the amended map where it is enabled to do so. It treats the amended map as a new initiation of its rights, and where the rights of a settler have not attached then both the right to construct as against the government and the title as against the settler date from the date of filing the second map. But when the rights of settlers have intervened it claims under the original map. Surely such a double-barreled position will not be permitted. If the rights in one

instance date from the amended map, then they would in all instances. The position of appellee is clearly illustrated by its admission on page 34 of its brief, as follows:

“First, if no rights had intervened between the filing of the two maps, there would be no necessity of claiming anything by virtue of the original approval.”

But the strange doctrine contended for by appellee on page 37 of the brief is that even though appellee may have abandoned the old right-of-way, that fact cannot be raised in this action. This is in effect contending that even though appellee has in fact abandoned the old right-of-way, it still owns the title to that right-of-way across appellant's land. It is not clear how a railroad can abandon a right and still own it. Abandonment is a fact, and when conceded by appellee no rights covered by the abandonment can be relied upon. Appellee comes into this court saying: “We claim to own a right-of-way across appellant's land by reason of a right-of-way determined by a map filed in 1907; we concede for the sake of argument that we have abandoned that old right-of-way and yet that fact is not material in this action.” It is hard to follow such reasoning.

Counsel cites several cases which hold that the proviso in the act of March 3, 1875, that the road must be built within five years, is a condition subsequent and is a matter which can only be raised by the government. We concede that such is the law, but we are unable to see any analogy between a con-

dition subsequent contained in the granting act and a substantive fact of abandonment. Abandonment is a state of affairs, a condition, a fact. Abandonment arises where the railway company does some act which in itself amounts to abandonment, and therefore any attempt to liken the situation to a failure by a railroad to construct within the time limit required by the act is wholly vain and useless. When appellee contends that appellant cannot show that there has been an abandonment in fact of the map under which appellee claims its rights, its contention amounts to a claim that appellant cannot go into the question of the title of the railroad at all. The absurdity of this position is so apparent that no further discussion is necessary.

CONCLUSION.

For the foregoing reasons and for those set forth in the original brief of appellant we maintain:

First, that the Great Northern Railway Company never, prior to the initiation of appellant's rights in the land in question, acquired any right-of-way under the Act of March 3, 1875.

Second, that if it did so acquire a right-of-way by the filing of a map of alignment, it abandoned said rights as against appellant when it initiated its rights over again by the filing of the second map of alignment.

Respectfully submitted,

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